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IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

October Term, 1982

No. A-428

WYNETTE E. BENNETT, Administratrix of
the Estate of EDWIN N. BENNETT,

Petitioner,

vs.

ENSTROM HELICOPTER CORPORATION,

Respondent.

PETITION FOR
WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

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January 9, 1983

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

October Term, 1982

No. A-428

WYNETTE E. BENNETT, Administratrix of
the Estate of EDWIN N. BENNETT,

Petitioner,

vs

ENSTROM HELICOPTER CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, WYNETTE E. BENNETT,
respectfully prays that a Writ of Cert-
iorari issue to review the judgment and
opinion of the United States Court of
Appeals for the Sixth Circuit entered in

this proceeding on June 3, 1982,
reported at 679 F2d 630 (1982) reported
at 686 F2d 406 (1982) and the opinion on
rehearing entered on August 12, 1982.

QUESTION PRESENTED

Whether a federal court of appeals affirming the erroneous application of foreign substantive law in a diversity case has departed from the accepted and usual course of judicial proceedings, calling for the exercise of this Court's power of supervision, where it refuses to follow decisions of the highest courts of the forum state and the foreign country, which were issued subsequent to oral argument in the appellate court, and which together uphold the plaintiff's cause of action.

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OPINIONS BELOW

The opinions of the Court of Appeals are reported at 679 F2d 630, and 686 F2d 406, and appear in the Appendix. The opinion rendered by the District Court for the Western District of Michigan was not reported, and appears in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on June 3, 1982, and the opinion on rehearing was entered August 12, 1982. The motion for extension of time in which to file this Petition for Certiorari was granted on November 10, 1982, within 90 days of that date. This Court's jurisdiction is invoked under 28 USC §1254 (1).

STATUTORY PROVISIONS INVOLVED

The pertinent portions of the New Zealand Accident Compensation Act 1972 are sections 5(1), 43, 102B, 122, 123(5) and 131. The full text of these sections is set forth in the Appendix.

STATEMENT OF THE CASE

Petitioner Wynette Bennett brought an action in the District Court for the Western District of Michigan against Respondent Enstrom Helicopter Corporation, alleging that respondent's breach of express and implied warranties, negligence, and breach of bailment had caused the death of her husband. Respondent was the owner and manufacturer of a helicopter which had been shipped to New Zealand for the purpose of developing an overseas market for the

product. The jurisdiction of the district court was invoked under 28 USC §1332(2) because of diversity of citizenship, the plaintiff being a citizen of New Zealand and the defendant a citizen of Michigan, incorporated and having its principal place of business in that state.

At the time of the accident, Enstrom was owned by F. Lee Bailey. Mr. Bailey deputized his brother-in-law, Michael Spearman, to represent Enstrom interests in New Zealand, and later sent his top mechanic, Michael Meger, to participate in the demonstration of the helicopter.

Mr. Spearman contacted Edwin Bennett, petitioner's husband, to obtain his services in training New Zealand buyers. On August 21, 1974, Mr. Bennett was demonstrating the helicopter to two potential purchasers. During a brief

stop at a resort area, the helicopter backfired after ignition. On the return flight across Lake Rotorua, the helicopter lost all power, crashed, and rapidly sank in the icy water. The helicopter was not equipped with flotation devices, although both Spearman and Meger were aware that such devices were required by the New Zealand Aviation Code. Mr. Bennett and one of his passengers drowned.

The engine failure which caused the accident was familiar to Meger, because identical failures had caused accidents while the helicopter was being tested in the United States. Curiously, when Spearman reported the Bennett fatality to Ernest Medina and Bailey at the home office, the Enstrom personnel assumed that damages were to be covered by a United States insurance company.

Yet Enstrom moved for dismissal and summary judgment pursuant to FRCP 56, arguing that the New Zealand Accident Compensation Act of 1972 (ACA) barred any proceedings, or recovery of damages other than those provided to the petitioner under the ACA. This argument was supported by the affidavit of Sir John Ross Marshall, concluding that the case could not be brought in any New Zealand court. The motion was denied pending further discovery, and was subsequently renewed. On November 12, 1980, the Honorable Douglas W. Hillman issued a memorandum opinion granting summary judgment on the basis that "plaintiff's action [was] barred by the New Zealand Accident Compensation Act."

The matter was pursued to the Sixth Circuit Court of Appeals. Oral arguments were conducted on March 4, 1982.

The case was decided on June 3, 1982, when Michigan, the forum state, espoused the conflicts rule that the substantive law of the place of the wrong controls. Relying upon Judge Hillman's decision, the Court of Appeals held that, "[t]here is simply no longer, under New Zealand substantive law, a common law tort action for persons covered by the Compensation Act." The court noted that petitioner would prevail "only if there is some reason to bend the Michigan conflicts rule of lex loci delicti."

Such a reason presented itself on June 14, 1982, when the Michigan Supreme Court released Sexton v Ryder Truck Rental, Inc., 413 Mich 406 (1982), which largely overruled the lex loci rule in the context of motor vehicle and aircraft accidents. Petitioner promptly sought, and was granted, rehearing.

Upon reconsideration, the Court of Appeals reaffirmed the district court's judgment for Enstrom because the court decided that a balancing of the respective interests of Michigan and New Zealand demonstrated little reason to apply Michigan law to the case.

The 90-day period for seeking Supreme Court review was to expire on November 10, 1982. On November 4, 1982 petitioner's counsel received a telephone call seeking information about the instant case from a New Zealand attorney who was writing her thesis for an L.L.M. on the topic of the New Zealand Accident Compensation Act (ACA). In the course of the conversation, she indicated that the highest court in New Zealand had recently issued two opinions regarding the continued availability of a claim for exemplary damages in New Zealand courts.

As a result of Donselaar v Donselaar and Taylor v Beere, decided on March 19, 1982, the academic and judicial controversy which had raged in New Zealand since the 1972 passage of the ACA was put to rest. A claim for exemplary damages is now clearly recognized as one that is available despite the ACA.

With this information, petitioner immediately submitted a motion to extend the time in which to file for rehearing, as well as a second petition for rehearing to the Sixth Circuit Court of Appeals. Respondent opposed the rehearing petition and the court of appeals denied the requested waiver of FRAP 40(a), thus foreclosing review of the underlying petition. Concurrently, petitioner requested this court to extend the time for filing her petition for certiorari, to permit counsel to receive and review

the operative New Zealand opinions.¹

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS REFUSED TO FOLLOW THE DECISIONS OF THE MICHIGAN SUPREME COURT AND THE NEW ZEALAND COURT OF APPEALS, WHICH WERE ISSUED SUBSEQUENT TO ORAL ARGUMENT IN THE SIXTH CIRCUIT, AND TOGETHER PERMIT PLAINTIFF TO MAINTAIN HER CAUSE OF ACTION.

A federal court sitting in diversity applies the conflicts law of the forum state. Klaxon Co. v. Stentor Electric Manufacturing Co., 313 US 487; 61 SCT 1020, 85 LEd 1477 (1941). In reliance upon what it conceived to be the principles established by Michigan law, the Sixth Circuit held that lex loci delicti would apply. The court of

¹ Counsel was unable to obtain copies of either opinion until early in December. However, a summary of the Donselaar case was located and provided to both the Sixth Circuit and to this Honorable Court.

appeals accepted the opinion of the district court that the lex loci operated to bar the plaintiff's claim, on the basis that the ACA was an exclusive remedy provision.

Subsequent to oral argument in this case, the Michigan Supreme Court substantially abandoned the lex loci rule. The Sixth Circuit's order on rehearing acknowledges the change in the conflicts doctrine² but nevertheless declined to apply Michigan substantive law.

Petitioner had argued at both the

² Justice Levin, who signed both "majority" opinions in Sexton, noted that, "there appears to be little reason to have one choice-of-law rule for lawsuits where the defendant is subject to the jurisdiction of Michigan because he, she or it resides or does business in this state and another rule for lawsuits where the defendant is subject to Michigan jurisdiction because of some other relationship with this state. I

district and circuit courts that the lex fori applied. Even if it did not, petitioner maintained that the lex loci would not bar her claim.

Respondent introduced nothing in the trial court proving that the ACA was plaintiff's exclusive remedy. In fact, respondent's only evidence on this point was provided by a New Zealand affiant who concluded that the ACA was silent with regard to maintenance of actions

2 (continued) therefore agree with Justice Kavanagh that we should go the distance and declare that Michigan law will apply in all personal injury and property damage actions without regard to whether the plaintiffs and defendants are all Michigan persons unless there is compelling reason for applying the law of some other jurisdiction, and that merely because the injury arose out of an occurrence in another state is not such a reason." (Footnote omitted, emphasis added). 413 Mich at 442.

outside New Zealand.³ The great weight of authority holds that the party with the affirmative burden of proof on an issue of foreign law loses if he fails to prove that law. Cuba Railway Company v Crosby, 222 US 473, 32 Sct 132, 56 LEd 274 (1912). Respondent failed to carry this burden.

The extent of the failure is apparent on a cursory examination of the literature and judicial opinions which have examined this aspect of the ACA. The instant case proceeded on a misconception that the ACA is an exclusive remedy in a case involving

³ The affiant conceded that the ACA provided a means for the Compensation Board's indemnification from funds obtained through proceedings in a foreign country. A 1978 amendment to the ACA clarified § 131(1) by providing that an overseas claim was available whether the injury occurred within or outside New Zealand.

wrongful death, which it is not. New Zealand substantive law provides two remedies for recovery of damages in case of personal injury or death due to an accident. One is found in the ACA, but the common-law remedy for wrongful death actions based on negligence⁴ was left intact.

Although the ACA abolishes the common-law right to bring proceedings for compensatory damages arising out of either tort or contract, it applies only

⁴ The common law regarding wrongful death, actio personalis moritur cum persona (a personal action dies with the litigant), was displaced by the 1936 Law Reform Act. The 1952 Deaths by Accident Compensation Act provides for a right of action when death is caused by negligence, and specifies who may bring an action and what amount of damages may be awarded. Promulgation of the ACA resulted in consequential amendments to various Acts of Parliament but did not repeal the extant wrongful death legislation.

where proceedings are brought "in New Zealand". Where death results from the injury which occurred in New Zealand, and there is coverage under the Act:

(1) a claim for both compensatory and exemplary damages can be brought outside New Zealand pursuant to §5(1) and §131(1) if allowed under the law of any other country (except New Zealand), and

(2) a claim for exemplary damages can be brought in New Zealand since the ACA does not bar such an action even where compensation has already been awarded under the Act. Donselaar v Donselaar.

The ACA left various areas of "residual liability", including the common-law tort of negligence. Applying New Zealand law in a Michigan court, an action may be brought under the 1936 Law

Reform Act and the 1952 Deaths by Accident Compensation Act, and for exemplary damages pursuant to the Donselaar and Taylor cases. This is the appropriate "substantive law" of New Zealand that should have been applied in considering petitioner's claim.

In refusing to consider the New Zealand cases which clearly uphold petitioner's cause of action in New Zealand, the court of appeals has, in effect, ignored its own interpretation of the Michigan Supreme Court's Sexton opinion. If the Sixth Circuit believes that a Michigan court would continue to apply the lex loci under these circumstances, it has an obligation to review the lex loci before affirming the district court's erroneous construction of the foreign law. In disregarding this obligation, the court of appeals

sanctions a gross miscarriage of justice, depriving this petitioner of the recovery she could have obtained if suit had been brought in New Zealand in the first instance.

Petitioner sought renewed access to the court of appeals to afford it the opportunity to correct its opinions in light of the definitive New Zealand cases. The Sixth Circuit declined further consideration. Denied the chance to apprise the court of appeals of its error, petitioner has no option but to seek Supreme Court review. Disregard of the Michigan and New Zealand case law, penalizing the petitioner for bringing her action in a United States court, is sufficient to invoke the court's general supervisory power over the federal judiciary.

CONCLUSION

For these reasons, a Writ of
Certiorari should issue to review the
judgment and opinions of the Sixth
Circuit.

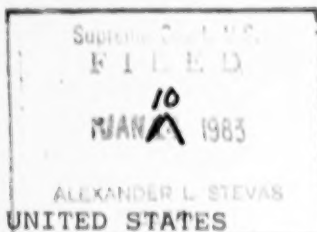
Respectfully submitted,

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January 9, 1983

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October Term, 1982

No. A-428

WYNETTE E. BENNETT, Administratrix of
the Estate of EDWIN N. BENNETT,

Petitioner,

vs.

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Respondent.

APPENDIX TO PETITION FOR
WRIT OF CERTIORARI TO
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APPEALS FOR THE SIXTH CIRCUIT

CHRISTINA A. G. SOUTHGATE
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January 9, 1983

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No. 80-1814

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WYNETTE E. BENNETT, Administratrix
of the Estate of EDWIN N. BENNETT
Deceased,

Plaintiff-Appellant,

v.

ENSTROM HELICOPTER CORPORATION,
a Michigan Corporation,
Defendant-Appellee.

APPEAL from the
United States District
Court for the West-
ern District of Mich-
igan, Southern Divi-
sion.

Decided and Filed June 3, 1982.

Before: EDWARDS, Chief Judge; PECK, Senior Circuit Judge;
and CHURCHILL,* District Judge.

PECK, Senior Circuit Judge. This is a conflicts of law case. Diversity of citizenship is the basis of federal jurisdiction. The issues are the usual ones in conflicts cases: which is the applicable substantive law, and what is the effect of applying it?

The underlying facts pertinent to this appeal are that plaintiff Bennett's husband died in the crash of a helicopter manufactured by defendant Enstrom. The helicopter went down in a frigid lake in New Zealand; Bennett's husband drowned. Bennett and her family resided in New Zealand. Enstrom Helicopter Corporation is a Michigan corporation. Bennett

* Honorable James P. Churchill, United States District Judge for the Eastern District of Michigan, sitting by designation.

brought this action under the Michigan Wrongful Death Act, MCLA § 600.2922, alleging breach of express and implied warranties, negligence, and breach of a bailment agreement.

The trial court granted summary judgment for Enstrom, holding that such actions are barred by the substantive law of New Zealand. The court properly applied the conflicts-of-law rules of the forum state — here, Michigan. In torts cases, Michigan usually applies the substantive law of the place of the wrong, traditionally termed the "*lex loci delicti*". E.g., *Sweeney v. Sweeney*, 402 Mich. 234, 236 (1978). The *lex loci*, the law of New Zealand, no longer permits common law personal injury actions. New Zealand has instead created a comprehensive administrative scheme of no-fault compensation for persons injured there. See generally Palmer, *Accident Compensation in New Zealand: The First Two Years*, 25 Am. J. Comp. L. 1, *passim* (1977).

On appeal, Bennett argues that the district court misconstrued New Zealand statutes or erred in applying New Zealand law. She points out that the New Zealand Compensation Act provides that no person covered under the Act may bring a personal injury action "in any court of New Zealand independently of this act. . . ." *Id.* § 5(1). Bennett's argument is that since her action was not brought "in any court of New Zealand," then this exclusive-remedy provision does not apply to her case. We agree, of course, with Bennett's implicit premise that the New Zealand legislature cannot restrict the jurisdiction of the courts of other sovereign states. We reject her conclusion that if the New Zealand Act's exclusive-remedy provision is inapplicable, then a Michigan court, ostensibly applying New Zealand substantive law, would ignore the rest of the Compensation Act and apply the Michigan Wrongful Death Act to her case. There is simply no longer, under New Zealand substantive law, a common law tort action for persons covered by the Compensation Act. Bennett is covered by the Act, and has in fact received compensation under it. If the *lex loci* applies, plaintiff Bennett loses.

Bennett prevails only if there is some reason to bend the Michigan conflicts rule of *lex loci delicti*. The Michigan Supreme Court has been critical of "reflexive" application of this rule. See *Sweeney, supra*, 402 Mich. at 236-37. Before applying the rule, Michigan courts should consider whether doing so would "frustrate an announced Michigan public policy." *Id.* at 242.

Bennett argues now, as she did in the district court, that Michigan has announced a public policy of promoting "safety in aeronautics." MCLA § 259.1. To that end the Michigan legislature further provided that

The owner or operator or the person or organization responsible for the maintenance or use of an aircraft shall be liable for any injury occasioned by the negligent operation of the aircraft, whether the negligence consists of a violation of the provisions of the statutes of the state, or in the failure to observe ordinary care in the operation, as the rules of the common law require.

MCLA § 259.180a.

The helicopter that Mr. Bennett went down in was exported by, but neither owned nor operated by, the defendant Michigan corporation. The district court noted Michigan's public policy of promoting safety in aviation but held that "[t]he mere fact that defendant's helicopter was manufactured in Michigan is an insufficient reason to invoke this state's public policy," citing *Hill v. Clark Equip't Co.*, (Mich. App. Dec. 9, 1977) published as appendix to opinion reversing in part on rehearing, 85 Mich. App. 1, 4 (1978).

We agree. "The public policy of a state is fixed by its constitution, its statutory law, and the decision of its courts. . . ." *Branyan v. Alpena Flying Serv., Inc.*, 65 Mich. App. 1, 8 (1975). Bennett has pointed out no expression of public policy in any of these sources that would support application of Michigan substantive law to every case in which a product manufactured there has caused personal injury.

Even if a "dominant contracts" conflicts-of-law rule were to be applied to this case, it is doubtful that a Michigan court would apply Michigan substantive law. We recognize, as did the district court, that Michigan courts have resolved choice-of-law questions by what may be called a dominant contacts approach. See *Storie v. Southfield Leasing, Inc.*, 90 Mich. App. 612, 619 *appeal granted*, 407 Mich. 908 (1979); *Branyan, supra*, 65 Mich. App. at 9-10. The contacts with Michigan noted in these cases are absent here. Neither the decedent nor his family resided in Michigan. The downed helicopter was not owned by a Michigan resident or corporation. Although the bailment of the helicopter to Mr. Bennett was, as the district court noted, in a "commercial environment, there was no sale and no employment contract [between defendant Enstrom and the decedent]."

For these reasons, the judgment of the district court is affirmed. Costs to appellee.

No. 80-1814
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WYNETTE E. BENNETT, Administratrix of
the Estate of EDWIN N. BENNETT,

Plaintiff-Appellant,

v.

ENSTROM HELICOPTER CORPORATION,

Defendant-Appellee.

ORDER

Filed August 12, 1982

Before: EDWARDS, Chief Judge; PECK,
Senior Circuit Judge; and CHURCHILL,*
District Judge.

There is before us an appellant's
motion for clarification of our opinion
of June 3, 1982, an appellant's petition
for rehearing with supporting documents,

* Honorable James P. Churchill, United
States District Judge for the Eastern
District of Michigan, sitting by
designation.

and an appellee's brief in opposition to the petition for rehearing. We have examined these materials and hereby grant Appellant Bennett's timely petition for rehearing. For the following reasons, upon reconsideration, we again affirm the district court's judgment for defendant-appellee Enstrom.

I.

Since this Court's original decision in this diversity case, the Supreme Court of Michigan has substantially changed the relevant law of that state by its decisions in Sexton v. Ryder Truck Rental, Inc. and Storie v. Southfield Leasing, Inc., Nos. 61606, 63362 (Mich., June 14, 1982) (hereinafter Sexton). The determinative issue in this case remains whether a Michigan court would apply Michigan substantive

law, the lex fori, to Bennett's action. Bennett's petition for rehearing relies on Sexton in arguing that Michigan would now apply its own law. We reaffirm our earlier holding that Bennett's cause would be decided by a Michigan court according to New Zealand substantive law, the lex loci delicti, which would bar the action, and we note that this holding is not attacked in Bennett's petition for rehearing.

The effect of the Sexton decision on the disposition of this case is not easily summarized. Sexton produced two "majority" decisions, with one justice joining in two opinions. Justice Williams' opinion established two rules:

- (1) "[W]here Michigan residents or corporations doing business in Michigan are involved in accidents in another state and appear as plaintiffs and defendants in Michigan courts, the courts will apply the lex fori, not

the lex loci delicti..., without reference to any particular state policy."

Sexton, slip op. of Williams, J., at 17. (Emphasis added).

(2) Michigan's owners' liability statutes, including the aircraft owner's statute, MCLA §259.180a, will be given "uniform application to residents traveling outside of Michigan as well as [to] persons within our state." Id. at 20. The rationale for this rule is that these statutory causes of action are founded not on any conduct of the parties outside of Michigan "but on the relationship between Michigan owners and Michigan operators."

Id. (Emphasis added).

Neither of these holdings avails the plaintiff, who is not a Michigan resident.

Justice Kavanagh's second "majority" opinion held that the place of the wrong is no longer a "fact controlling or even of great significance" to choice-of-law questions, since the state clearly has

the "power" to regulate the extraterritorial consequences of the intrastate status of ownership. Although Justice Kavanagh's opinion could be read as requiring application of the Michigan owners' liability statutes to all Michigan vehicle and aircraft owners,¹ the more natural and less radical reading of Justice Kavanagh's opinion is that given by Justice Levin, who concurred in Justice Kavanagh's opinion and wrote separately:

"Justice Kavanagh's opinion would hold that in a tort action commenced in Michigan, the domestic law of this state shall govern absent a reason for applying the law of another state and that the place of wrong is not a reason for not

¹ We assume for present purposes, without so finding, that the defendant, and not its New Zealand subsidiary or proto-subsidiary, was the legal owner of the helicopter involved in this case. See Part II, infra.

applying Michigan domestic law."

Slip op. of Levin, J., at 2.

We believe that a Michigan court would find the following reasons for applying the law of New Zealand to this case:

"The plaintiff and her decedent were New Zealanders at the time of the alleged torts (D. Ct. mem. op. at 1);

The plaintiff has received compensation for her injury under the laws of New Zealand (id. at 2);

The flight on which Mr. Bennett died began and ended in New Zealand (id. at 4);

The fatal helicopter had been shipped to New Zealand for sale and use there (id.);

There was no helicopter sale and no employment contract between Mr. Bennett and Enstrom of Michigan, although there may have been business contacts between them in Michigan (id. at 5);

The fatal helicopter had been lent to Mr. Bennett for his own purposes on the day of his

death (id.).

Bennett has not challenged any of these findings of fact as clearly erroneous. Singly and together, these facts show that the State of Michigan has little interest in applying its own laws to this case.²

We find no textual support for Bennett's statement that three of the Justices voting in Sexton would hold that the residence of the parties is not

² In a footnote to his concurring opinion, Justice Levin described similar tests for determining the extraterritorial application of Michigan civil liability statutes:

I agree that the . . . statutes apply where the loss arises out of an accident involving a vehicle which had a situs in Michigan when permission to use the vehicle was granted in Michigan and the journey began in Michigan.

Slip op. of Levin, J., at n. 1.
(Emphasis added.)

germane to the application of Michigan law. Justices Kavanagh, Fitzgerald and Levin would hold that the place of the wrong is of no significance, which is quite another thing. Their approach is not unlike that taken in our original decision of this case, in which we noted that the lex loci rule was not "reflexively" applied in Michigan.

II.

Bennett has also filed a motion for clarification of our opinion of June 3, 1982, in which we stated that "[t]he helicopter that Mr. Bennett went down in was exported by, but neither owned nor operated by, the defendant Michigan corporation." Slip op. at 3. We assume for purposes of this rehearing the state of affairs most favorable to Bennett, namely that Enstrom of Michigan, and not

Enstrom of New Zealand, owned and operated³ the aircraft at the time of the accident. Accordingly, the motion for clarification is moot and therefore denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman /s/

Clerk

³ Michigan law defines operation of an aircraft to include authorizing its use. See MCLA §259.22. The operator of the craft in the everyday sense of the word (the sense used in the Sexton opinions) was, of course, its pilot, Mr. Bennett.

No. 80-1814

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WYNETTE E. BENNETT, Administratrix of
the Estate of EDWIN N. BENNETT,

Plaintiff-Appellant,

vs

ENSTROM HELICOPTER CORPORATION,

Defendant-Appellee.

ORDER

Filed December 6, 1982

Before: EDWARDS, Chief Judge; PECK,
Senior Circuit Judge; and CHURCHILL,
District Judge.

Upon consideration of the Motion to
Enlarge Time to File Second Petition for
Rehearing filed herein by the Plaintiff-
Appellant, and the response of the
Defendant-Appellee in opposition to said
motion,

It is ORDERED that the motion be and

it hereby is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman /s/

Clerk

UNITED STATES OF AMERICA
IN THE DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. M75-59 CA2

WYNETTE E. BENNETT, Administratrix of
the Estate of EDWIN N. BENNETT,

Plaintiff,

vs

ENSTROM HELICOPTER CORPORATION,
a Michigan corporation,

Defendant.

MEMORANDUM OPINION

Filed November 12, 1980

This is a wrongful death action brought under the court's diversity jurisdiction by plaintiff Wynette E. Bennett, administratrix of the estate of Edwin N. Bennett, and a citizen of New Zealand, against defendant Enstrom Helicopter Corporation (Enstrom), a Michigan corporation. Plaintiff's husband, also

a New Zealand citizen, was killed while piloting an Enstrom helicopter, manufactured in Michigan, on a demonstration flight at Lake Rotorua, New Zealand, on August 21, 1974. Plaintiff seeks recovery of \$1 million damages under the Michigan Wrongful Death Act, MCLA §600.2922; MSA §27A.2922, on four counts: breach of implied warranty of fitness, breach of express warranty, negligence, and breach of implied duties of care owed to a bailee.

Enstrom now moves the court to dismiss this action pursuant to FRCP 12(b) and (c), or for a grant of summary judgment, pursuant to Rule 56. Because evidence outside the pleadings has been presented to and not excluded by the court, the motion will be treated as one for summary judgment.

Enstrom argues that New Zealand law

governs this case and under the law of that country, the action is barred. I agree, and accordingly, grant defendant's motion for summary judgment.

I. NEW ZEALAND LAW

The first question before the court is the operation and effect of New Zealand law. In support of its motion, defendant has submitted the affidavit of John Ross Marshall, a Barrister of the New Zealand Supreme Court, past Prime Minister of New Zealand, and former Chairman of the cabinet committee which drafted the original legislation for the New Zealand Accident Compensation Act of 1972. A copy of the Accident Compensation Act, as amended, is attached as Appendix A to his affidavit.

Sir John is eminently qualified to explain the present state of accident

compensation law in New Zealand. He states that the Act provides for payment of compensation for the personal injury or death in New Zealand of "all persons whether employed, self-employed, or unemployed and whether a New Zealand citizen or not. . ." Sections 4(2), 122-125. Affidavit, ¶22, at 6. This compensation is an exclusive remedy. Section 5, subsection (1), of the Act states:

"Subject to the provisions of this section, where any person suffers personal injury by accident in New Zealand or dies as a result of personal injury so suffered, or where any person suffers outside New Zealand personal injury by accident in respect of which he has cover under this Act or dies as a result of personal injury so suffered, no proceedings for damages arising directly or indirectly out of injury or death shall be brought in any Court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule of law or enactment."

Subsection (2) abolishes the cause of action for loss of consortium. It is undisputed that plaintiff's decedent was covered by the Accident Compensation Act and plaintiff received compensation, in an undisclosed amount, as a result of his death. Affidavit ¶24, at 7. Sir John concludes:

"In these circumstances no proceedings for damages arising directly or indirectly out of the death of Edwin H. Bennett can be brought by any person under any rule of law or any enactment in any Court in New Zealand. . ."

Affidavit, ¶25 at 7. The court adopts these conclusions as a correct statement of the applicable New Zealand law.

II. MICHIGAN LAW

The court turns next to the question whether this action is governed by New Zealand or by Michigan law. It is well established that a federal court sitting

in diversity is required to apply the conflict of laws doctrine of the forum state. Klaxon v Stentor Elec. Mfg., 313 U.S. 487, 61 S.Ct. 1020, 85 L.ED. 1477 (1941). In Michigan, it is the standard rule that liability for an alleged tort is governed by the substantive law of the place of injury. Abendschein v Farrell, 382 Mich. 510, 172 N.W.2d 137 (1969); Wingert v Wayne Circuit Judge, 101 Mich. 395, 59 N.W. 662 (1894). In the instant case, of course, the place of injury was New Zealand.

Defendant first made a motion to dismiss on the basis of New Zealand law in 1976. In an order dated July 25, 1977, Judge Miles denied that motion on the grounds that the Michigan doctrine on the applicability of foreign law was then in a state of flux. Since then, however, despite continued criticism,¹

the Michigan Supreme Court has expressly declined to overturn the traditional rule of lex loci delicti, except where it would frustrate an announced Michigan public policy. Sweeney v Sweeney, 402 Mich. 234, 262 N.W.2d 625 (1978).

Plaintiff argues her cause of action is saved by this exception. She maintains Michigan's public policy favors the application of this state's law over foreign law in aircraft crash cases, citing Branyon v Alpena Flying Service, Inc., 65 Mich.App. 1, 236 N.W.2d 739 (1975), and Storie v Southfield Leasing, Inc., 90 Mich.App. 612, 282 N.W.2d 417 (1979). In Branyon, the Michigan Court of Appeals refused to apply Virginia law in a case arising from an airplane crash

¹ See, e.g., Sexton v Ryder Truck Rental, Inc., 84 Mich. App. 60, 269 N.W.2d 308 (1978), Gillis, J.

in Virginia. The court found Michigan's interests to outweigh Virginia's because the flight had originated in Michigan, the aircraft was owned and hangared in Michigan, and both decedents were Michigan residents. The Michigan Wrongful Death Statute, not Virginia's, was applied. In Storie, the Court of Appeals again refused to apply the lex loci delicti doctrine. Like Branyon, the Court noted, "all the principals involved were Michigan residents", the flight had originated in Michigan, and the aircraft was owned and registered in Michigan. 282 N.W.2d at 419. Moreover, the Court reasoned that, on the facts, the Michigan Aircraft Ownership Liability Statute, MCLA §259.180a(a); MSA §10.280(1), embodied a public policy in favor of liability:

"The statute appears to be directed toward increasing the

safety of aircraft flown within the state. . . We believe this purpose would be undermined by permitting owners of airplanes to escape liability on the basis of the mere fortuity that the injury did not occur within the boundaries of this state."

Id.

The instant case, however, is distinguishable from both Branyon and Storie. None of the vital indicia for application of Michigan public policy is present here. The only decedent in this case was a citizen of New Zealand. The flight on which Mr. Bennett died originated and ended in New Zealand. Though manufactured in Michigan, the helicopter had been shipped to New Zealand for sale and use there. The mere fact that defendant's helicopter was manufactured in Michigan is an insufficient reason to invoke this state's public policy. In a per curium opinion, the Court of Appeals reaffirmed the lex loci delicti doctrine

over a similar public policy argument:

"Plaintiff argues that Michigan has a public policy of protecting 'all who buy or use products manufactured and sold in Michigan.' . . . We are not persuaded that Michigan public policy requires such expansive interpretation. We see little Michigan interest in securing tort damages to persons so situated. Absent a legitimate government interest to support it, there is no reason to presume the existence of a policy compelling application of Michigan law."

Hill v Clark Equipment Co., 85 Mich.App. 1, 270 N.W.2d 722, 725 (1977, released for publication 1978).

The court notes also that plaintiff here has received compensation for her husband's death under the New Zealand Act and thus has not lacked for a remedy. I conclude, therefore, that the facts of this case do not warrant invocation of the public policy exception and that under the traditional rule, the law of New Zealand, as the place of

injury, must govern this action.

Nor can plaintiff argue tort doctrine does not encompass her cause of action. Plaintiff's claim is brought under the Wrongful Death Statute which covers deaths "caused by wrongful acts, neglect, or default. . ." MCLA §600.2922; MSA §27A.2922. All claims actionable as torts are covered, including actions based on breach of warranty. Piercefield v Remington Arms Co., Inc., 395 Mich. 85, 133 N.W.2d 129 (1965). See also, Practice Commentary, "Basis of Liability", Carl S. Hawkins. In the instant case, plaintiff's claims are all classifiable as torts. Despite the commercial environment here, there was no sale and no employment contract. The helicopter had been lent to decedent for his own purposes on the day of his death. Any duty of care

arising from this bailment is cognizable as a tort under the Wrongful Death Act and covered by the lex loci rule.

In summary, I find that the Michigan rule for torts, lex loci delicti, applies to all of plaintiff's claims and that the substantive law of New Zealand governs this case. I hold that plaintiff's action is barred by the New Zealand Accident Compensation Act exclusive remedy provision and, accordingly, grant defendant's motion for summary judgment.

IT IS SO ORDERED.

DOUGLAS W. HILLMAN /s/
District Judge

Dated: November 12, 1980.

UNITED STATES OF AMERICA
IN THE DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. M75-59 CA2

WYNETTE E. BENNETT, Administratrix of
the Estate of EDWIN N. BENNETT,

Plaintiff,

vs

ENSTROM HELICOPTER CORPORATION,
a Michigan corporation,

Defendant.

ORDER

Filed November 12, 1980

Defendant Enstrom Helicopter Corpor-
ation having moved the court for summary
judgment, pursuant to Fed.R.Civ.P. 56,
and the court being fully informed, and
for good cause shown; now, therefore,

The court finds the law of New
Zealand bars this wrongful death action
by virtue of the exclusive remedy

provision of the Accident Compensation Act of 1972, as amended.

Accordingly, defendant's motion for summary judgment is granted, and plaintiff's complaint is dismissed. The parties are to assume their own costs.

IT IS SO ORDERED.

DOUGLAS W. HILLMAN /s/
District Judge

Dated: November 12, 1980.

NEW ZEALAND ACCIDENT
COMPENSATION ACT 1972

Section 5(1)

Effect of Act on claims for damages
- (1) Where any person suffers personal injury by accident, or dies as a result of personal injury so suffered:

(a) No action shall lie for damages in respect of the injury or death, whether by that person or any other person, and whether under any rule of law or any enactment, if, at the time of the accident, the injured or deceased person had or was deemed to have cover under this Act in respect of personal injury by that accident:

(b) This Act shall not affect any action for damages in respect of the injury or death of the person, if, at the time of the accident, that person did not have and was not deemed to have cover under this Act in respect of personal injury by that accident.

(2) Nothing in this section shall affect -

(a) Any action which lies in accordance with section 131 of this Act; or

(b) Any action for damages by the injured person or his administrator or any other person arising out of a policy of insurance.

(3) No person shall have cover under

the earners' scheme or the motor vehicle accident scheme, as the case may be, in respect of personal injury by accident, unless the scheme was in operation at the time of the accident.

(4) Where in any proceedings before a Court a question arises as to whether a person who has suffered personal injury by accident, or died as a result of personal injury so suffered, had cover within the meaning of this Act in respect of the injury, the Court shall refer the question to the Accident Compensation Commission for decision, and the Commission shall have exclusive jurisdiction to determine the question.

(5) The Commission may, on the application of any person, determine any such question.

(6) Subject to Part VII of this Act, a subsisting decision of the Commission under subsections (4) and (5) of this section shall be conclusive evidence in any proceedings as to whether or not the person to whom the decision relates had such cover.

Section 43.

Commission to promote general safety
- (1) It shall be a matter of prime importance for the Commission to take an active and coordinating role in the promotion of safety in all

the different areas where accidents can occur, [in New Zealand].

(2) In so promoting safety the Commission shall be concerned to -

(a) Avoid human suffering; and

(b) Prevent wastage of manpower, and so assist efficiency and productivity.

Section 102B.

Cover under supplementary scheme - subject to the provisions of this Act, all persons shall have cover under the supplementary scheme in respect of personal injury by accident in New Zealand if they do not have cover in respect thereof under either the earners' scheme or the motor vehicle accident scheme.

Section 122.

Funeral expenses - subject to any regulations made under this Act, where a person dies as a result of personal injury by accident in respect of which he has cover under this Act, the Commission shall pay his funeral expenses to the extent that it considers that the amount thereof is reasonable by New Zealand standards.

Section 123.5.

In considering, for the purposes of

this section, questions relating to dependency and relative needs, the Commission shall have regard to all relevant considerations, and may, whenever it considers that it is just, take into consideration all or any of the following matters:

(a) Any gain to any person that is consequent on the death of the deceased person; and

(b) Circumstances that have arisen after the date of the death of the deceased person; and

(c) The needs of each person concerned.

131.

Compensation under Act in cases where claim lies overseas, etc. -

(1) In any case where a person suffers personal injury by accident outside New Zealand, or dies as a result of personal injury so suffered, if the person has cover under this Act in respect of the injury, and if under the law of the country in which he suffers the injury, or under the law of any other country (except New Zealand), or pursuant to any international agreement or convention or protocol, or any amendments thereto, a claim for damages or compensation in respect of the injury or death lies on behalf of the person or the administrator or the widow or widower or a child or dependant of

the person, the Commission may, in its discretion, do all or any of the things specified in subsection (3) of this section.

Section (2).

In any case where a person suffers personal injury by accident, either within or outside New Zealand, while he is a passenger on international carriage within the meaning of the Carriage by Air Act 1967, or dies as a result of personal injury so suffered, if the person has cover under this Act in respect of the injury, the Commission may, in its discretion, do all or any of the things specified in subsection (3) of this section, if a claim for damages or compensation in respect of the injury or death lies on behalf of the person or the administrator or the widow or widower or a child or dependant of the person -

(a) Under the law of the country outside New Zealand having jurisdiction in respect of the accident; or

(b) Pursuant to any international agreement or convention or protocol, and any amendments thereto; or

(c) Pursuant to any agreement between carriers in respect of international carriage by air.

(3) The things which the Commission

may do in the circumstances specified in subsections (1) and (2) of this section are -

(a) Deduct from the compensation that is payable under this Act to the injured or deceased person or the widow or widower or any child or dependant of that person any amount recovered by the enforcement of that claim or as compensation or otherwise in respect of the injury or death; and recover from any person to whom any compensation has been paid under this Act any amount that is in excess of the amount properly payable to that person having regard to the provisions of this paragraph:

(b) Require, as a condition precedent to the grant of all or any of the compensation payable under this Act, that all reasonable steps be taken (whether by the injured person, or by the administrator or the widow or widower or any child or dependant of the deceased person, or by assignment of rights to the Commission) to pursue the claim for damages or compensation or any other rights in respect of the injury or death or to enable the claim or rights to be pursued:

(c) Meet the whole or such part as it thinks fit of the costs and expenses incurred in pursuing that claim.

AMENDMENT TO 131.

12. Compensation under Act in cases where claim lies overseas, etc. - Section 131 of the principle Act is hereby amended by inserting in subsection (1), before the words "outside New Zealand", the words "either within or".

IN THE COURT OF APPEAL OF NEW ZEALAND

CA 145/77

19 March 1982

JOHN DONSELAAR

VS

ANDRIES DONSELAAR

JUDGMENT OF SOMERS J.

On 18 March 1981 we gave judgment on all issues arising on this appeal save one which was argued the following day and which now fails to be determined.

By his re-amended statement of claim of 25 May 1977 the first appellant (the first plaintiff in the Supreme Court) alleged that on 1 October 1976 -

"21. THAT at the time and place aforesaid the First Defendant assaulted the First Plaintiff with a hammer thereby injuring the First Plaintiff.

22. THAT by reason of such assault the First Plaintiff was rendered unconscious, has undergone pain and suffering and has required hospital and

other medical treatment.

23. THAT as further consequences of the said assault the First Plaintiff has suffered substantial indignity, mental suffering, disgrace and humiliation."

In respect of the cause of action so pleaded the first appellant claim "exemplary or punitive damages \$5,000.00" from the First Respondent (First Defendant in the Supreme Court) and an injunction restraining him from molesting or assaulting the plaintiff.

For convenience I shall refer to the parties as plaintiff and defendant.

By his statement of defense the defendant as well as denying the averments of the plaintiff claimed that the latter had no cause of action by reason of the provisions of the Accident Compensation Act 1972. In response to an earlier similar pleading by the plaintiff the defendant had moved to strike

out the claim upon the ground that the cause of action had been abolished by the statute. During the course of the trial that application was argued, in respect of the amended pleadings, and in an oral judgment delivered on 28 July 1977 the trial judge, Quilliam J. struck out the first appellant's claim for relief by way of exemplary damages saying -

"The foundation of the right to claim exemplary damages is still assault which has caused injury. If it is necessary to rely upon such a foundation as it is necessary for the plaintiff to do here then it follows that the proceedings may not be brought and so the motion must succeed."

From that determination the plaintiff appeals.

It may be added that the claim for injunctive relief was not affected by the judge's decision.

Two matters should be stated at

once. First, the issue posed for the determination of this Court is whether recovery of exemplary damages is barred by the Accident Compensation Act 1972 where the act complained of causes personal injury. Although, I do not consider such issue arises on the pleadings and the plaintiff's evidence in this case, because the point has been fully argued, is not dependent upon the particular facts of the case, is of general importance, and has been the subject of divergent views in the High Court, I propose to express my views upon it. Secondly, the principles which govern the exercise of the inherent jurisdiction to strike out pleadings are not in doubt. They were recently referred to in this Court in Lucas & Son (Nelson Mail) Ltd. v O'Brien, 2 NZLR 289, 294-5, 307-8. Because the effect

of an order is to strike out the claim in limine so precluding the claimant from advancing it at all an order is only made in plain or obvious cases. To determine whether a case answers that description may involve extensive argument. Where, as here the plaintiff has put his whole case and the issue is really a naked question of law those misgivings which often surround the exercise of the jurisdiction have little force.

It is convenient first to refer to the nature of exemplary damages. They are not compensatory but intended to punish the defendant and their award seeks to achieve recognised objects of the criminal law - deterrence and retribution. All this is discussed in Taylor v Beere the judgments in which case are about to be delivered. The

justification for receipt of damages by the plaintiff is expressed in this way in Rookes v Barnard [1964] A.C. 1129, 1227 by Lord Devlin -

" . . . the plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour. The anomaly inherent in exemplary damages would become an absurdity if a plaintiff totally unaffected by some oppressive conduct which the jury wished to punish obtained a windfall in consequence."

Exemplary damages in cases of personal injury have only been recovered in the case of those nominate torts of assault battery and false imprisonment derived from the action of trespass vi et armis where the injury was direct. And while intentional application of force may not originally have been a prerequisite to the recovery of compensatory damages it may be taken as necessary to justify an award of

exemplary damages.

Next there are the relevant provisions of the Accident Compensation Act 1972. They include the long title, the definition of personal injury by accident contained in s.2(1), and the provisions of ss.4 and 5. I do not propose to burden this judgment by setting them out in full. All were introduced into the Act by the Amendment (No. 2) of 1973 passed before the principal Act came into force. They are not therefore the fruit of experience but of further abstract consideration. Although I do not refer to the original text of the statute I have considered it in reaching the views I express.

The effect of the Act upon a claim for exemplary damages has given rise to differences of opinion in the High Court and also in academic and other

writings. In Koolman v Attorney-General (unreported Wellington A.519/76 judgment 3 October 1977) White J., following Quilliam J. in the present case, struck out a claim for exemplary damages founded upon allegations of assault and battery causing personal injury. Both cases were followed by Jeffries J. in Betteridge v McKenzie (unreported Wellington A.103/77 judgment 7 December 1978). In Stowers v Auckland City Corporation (unreported A.1064/77 judgment 22 February 1979) McMullin J. in a carefully reasoned judgment struck out a claim for exemplary damages for an assault by a traffic officer said to have caused personal injuries. And in Lucas v Auckland Regional Authority (unreported Auckland A.1003/79 judgment 24 March 1980) Pritchard J. considered that as exemplary damages are

essentially in augmentation of compensatory damages the former could not survive without the root upon which it is a parasite.

On the other side of the line is Howse v Attorney-General (unreported Wellington 132/75 judgment 22 December 1977) in which O'Regan J. held that exemplary damages did not arise directly or indirectly out of the personal injury which the plaintiff suffered. And in Koolman v Miller (unreported Wellington 175/78) the plaintiff specifically pleaded that she did not allege personal injury. Her claim, limited to exemplary damages, proceeded to judgment.

Of the more extensive writings A.A.P. Willey in (1975) 6 N.Z.U.L.R. 250, 267 et seq. concluded the statute barred a claim for exemplary damages where personal injury had been

sustained. Miss Margaret Venneel in (1975) 49 A.L.J. 22 and [1975] N.Z.L.J. 254 (the latter being but a summary of the former) considered an action was sustainable if exemplary damages were not in truth parasitic, that is, requiring other damages to which they might be annexed. D.B. Collins in [1978] N.Z.L.J. 158 considered the action maintainable; R.D. McInnes in [1979] NZLJ 8 took the opposite view. Reference should also be made to Professor Palmer's work on Compensation for Incapacity.

The expressions of opinion reflected in the cases and writings can be substantially distilled into two conflicting views. The first, which would exclude recovery, is that exemplary damages only lie in respect of the conduct of a defendant in the commission

of a wrong recognised as in other respects sounding in damages. Where that wrong causes personal injury exemplary damages relevantly arise "directly or indirectly out of the injury." The other, which would permit the action, is that the Accident Compensation Act has as its intended and effective purpose, only the exclusion of the recovery of relief by way of damages of a compensatory nature and does not purport to abolish any cause of action save those expressly so dealt with.

The initial inquiry must be whether upon its true construction the Accident Compensation Act places an embargo on proceedings to recover exemplary damages where the act of the intended defendant causes personal injury. If the statute does not directly prevent such an action a second issue arises namely whether

exemplary damages are so far dependent upon or linked to compensatory damages that the barring of actions for the latter necessarily prevents an action for the former.

The function of the Court in relation to a statute is to discover the intention of the legislature. That intent is to be ascertained from the words it has used. But the richness of the English language is such that the same words or phrases may convey different ideas depending upon the context and circumstances in which they are used. So it is that the words used in an enactment are to be considered in the light of the objects which the statute as a whole is intended to achieve. In modern legal parlance that is called a "purposive" construction. But it has still to be stressed that the inquiry is

not as to what the legislature meant to say but as to what it means by what it has in fact said in the framework of the Act as a whole.

The object and purpose of the Act immediately material to the present issue is that stated in s.4(1)(c) -

"To make provision for the compensation of -

(i) Persons who suffer personal injury by accident in respect of which they have cover under this Act; and

(ii) Certain dependants of those persons where death results from the injury."

That purpose is achieved by s.4(2) which provides -

"Subject to the provisions of this Act, all persons shall have cover under this Act in respect of personal injury by accident in New Zealand."

The cover there mentioned is defined in s.2 and includes the earners scheme, the motor vehicle scheme and the supple-

mentary scheme established in Parts III, IV and IVA of the Act respectively. They are funded in a way which casts a burden upon society little different in general from that which is bore prior to the act by way of premiums on insurance policies.

In the context of those stated objectives s.5(1) can reasonably be read as intended to bar proceedings to recover that which the Act itself provides namely compensation - those damages commonly labelled as compensatory and which include aggravated compensatory damages. The reference in the definition of personal injury by accident to "physical and mental consequences" of injury or accident has the same texture.

In short s.5(1) is complementary or correlative to the objects expressed in

s.4 - because compensation is provided no damages may be claimed.

But it is necessary to examine s.5 more closely. For even though the general purpose of a statute may seem clear the enacting words may show that Parliament in fact went further than was necessary to attain its objects. Section 5(1) provides as follows -

"Subject to the provisions of this section, where any person suffers personal injury by accident in New Zealand or dies as a result of personal injury so suffered, or where any person suffers outside New Zealand personal injury by accident in respect of which he has cover under this Act or dies as a result of personal injury so suffered, no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any Court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule of law or any enactment."

In the phrase "damages . . . arising out of the injury or death" the words "the

injury" are referable to the defined words "personal injury by accident" which is "suffered". The words "arising out of" are not a term of art in this context and are not wholly synonymous with any such terms as "resulting from", "flowing from", "caused by", "occasioned by" or "in consequence of". I consider the damages referred to are those suffered or sustained by a person injured, or recoverable as the result of his death, and which are direct or consequential upon the injury or death. That is to say they are compensatory in character. Injury (death may be ignored in the present context) is not a necessary concomitant for the award of exemplary damages and where injury occurs in circumstances in which such damages could be awarded the latter do not "arise out of the injury".

Thus far I have said nothing of the words "directly" or "indirectly". It is hardly conceivable that Parliament was addressing its attention to the distinction between trespass and case. Nor are the words apt to describe recoverable damages in defined ranges of remoteness (on this compare Coxe v Employers' Liability Assurance Corp. Ltd. (1916) 2 KB 629). The inclusion of those words seems likely to have been ex abundanti cautela - as to include for example recovery of funeral expenses when death has occurred and which would otherwise be recoverable, and perhaps to include any case of the nature of those referred to in s.5(2) which is not specifically mentioned. The most that can be asserted with confidence is that Parliament's attention was not directed to exemplary damages.

That leads to the final consideration. Exemplary damages though payable to the victim are in proper cases a salutary punishment of and a deterrent to high handed contumelious activity. Parliament may upon reflection conclude that in the case of personal injury they ought to be done away with. But where continued existence does not in any way strike at the apparent objects of the enactment - the substitution of compensation under statute for actions for damages - and the words used are at best doubtful the proper course for the Court to take is to leave the issue to Parliament which may readily enough put the matter aright if its true intent were other than that which I conceive it to be.

The Act providing no direct bar to proceedings to recover exemplary damages

the question remains whether the barring of claims for compensatory damages undoubtedly achieved by it operates to prevent the recovery of exemplary damages. It was on this point that Pritchard J. in Lucas v Auckland Regional Authority (unreported Auckland A.1003/79 judgment 24 March 1980) decided that exemplary damages were no longer recoverable in cases of personal injury.

The difficulties under this head are put as both conceptual and procedural. Section 5(1) does not, as s.5(2) does, abolish any cause of action. But assuming the conduct of the tortfeasor merits punishment exemplary damages are only to be awarded where compensatory damages are insufficient to achieve that end. If there are no compensatory damages there is no starting point for

the assessment of exemplary damages. If their award is permissible in isolation then in a case involving personal injuries the tribunal (judge or jury) will be obliged to consider what sum would be appropriate as compensatory damages in order to determine whether any and if so what sum ought to be added to achieve appropriate punishment. Necessarily this must involve all those features of a trial for damages for personal injury which were a familiar spectacle before the Accident Compensation Act 1972 including consideration and quantification of the (hypothetical) damages which would but for the Act have been awarded for pain and suffering, loss of amenities and loss of earning capacity. Added to that is a consideration of the appellate jurisdiction. One function of this Court is

to exercise some control over the amount of the verdict of a jury or assessment of other tribunals. If, in the case of a trial by jury, the amount of damages is such that no reasonable jury could properly have awarded the verdict will be set aside as being either excessive or too low. That jurisdiction has been exercised in relation to a lump sum award which (ex hypothesi) in a case attracting exemplary damages reflects a sum which both compensates and punishes. Because damages and verdicts for the same are expressed as a lump sum it has never been possible in a case in which exemplary damages were permissible to do much more than consider the total award in the round. If, where personal injury is involved, exemplary damages simpliciter may be awarded this Court too will be obliged to enter into some

enquiry as to what compensatory damages might, but for the Act, have been appropriate as a necessary step in deciding whether exemplary damages are within a permissible range.

In sum, it is said that to permit exemplary damages in a case of personal injury is either to alter the nature of such damages or to allow the same upon a mode of assessment which is now quite unreal and which in any event requires separate assessment of uncompensatable items.

I have not found this aspect of the case easy. The point was of course not touched in Taylor v Beere which was concerned with defamation.

In the end I have reached the conclusion that the primary purpose of exemplary damages being to punish and deter the fact that no other sanction in

the form of compensatory damages exists affords no sufficient reason to dispense with an objective which is still capable of serving a useful social purpose. The assessment of exemplary damages in cases of personal injury will not be easy. The substratum of compensatory damages has disappeared and with it all practical possibility of taking account of their award in estimating whether and to what extent there should be any addition by way of exemplary damages. A new approach is necessary. That which is appropriate in such cases may prove to be whether the circumstances as a whole merit punishment and if so what sum should, in those circumstances, be awarded in order to achieve that end. In the latter consideration the means of the parties will be material. See e.g. Rookes v Barnard (1964) A.C. 1129, 1229;

Pollock v Volpato (1973) 1 N.S.W.L.R. 653. I express my agreement with the observations of Cooke J. about the need for restraint in this area.

It remains only to refer to the present case. As pleaded I am of opinion that it is not a case of exemplary damages at all. More importantly the evidence of the plaintiff - which by the course of the trial the defendant has had no opportunity to refute - does not support such a case. The particulars of damage given and the circumstances evidenced are all within the concept of compensatory and aggravated damages as expounded in Cassells v Broome (1972) A.C. 1027 by Lord Hailsham of St. Marylebone L.C. and accepted as applicable in New Zealand in Taylor v Beere and nothing pleaded or evidenced as to the acts of the defendant is

sufficient to take the case out of that area. Indeed without some additional feature as for example an abuse of power or the invasion of other rights of the plaintiff, it is not easy to envisage a case of personal injury which would not have been met by compensator or aggravated compensatory damages the recovery fo which is barred by the Accident Compensation Act.

Accordingly I am of opinion that although the recovery of exemplary damages is not barred by the Accident Compensation Act this appeal should be dismissed.

Somers, J.

IN THE COURT OF APPEAL OF NEW ZEALAND

C.A. 145/77

19 March 1981

JOHN DONSELAAR

VS

ANDRIES DONSELAAR

JUDGMENT OF RICHARDSON J

This is an appeal against an interlocutory judgment of Quilliam J striking out the prayer for relief in the re-amended statement of claim seeking exemplary or punitive damages against the defendant Andries Donselaar. The important question which it raises is whether s.5(1) of the Accident Compensation Act 1972 bars the institution of proceedings seeking exemplary damages where, as a result of the conduct of which he complains, the plaintiff has

sufered personal injury by accident.

It is an issue which has provoked a difference of judicial opinion in the High Court. One view is that, inasmuch as exemplary damages may be awarded only in respect of the conduct of the defendant in committing a recognised tort, the foundation of the claim for exemplary damages in the present case is the battery which caused the injury and any such damages arise directly or indirectly out of that injury. The opposing view is that the subsection is directed against the possibility of recovery of compensation in addition to that provided under the Act; that in this respect it bars the remedy for trespass to the person in such a case but does not abolish the cause of action; and that proceedings for exemplary damages, which are awarded against a defendant to

punish him for his conduct in the commission of a tort and not as compensation for personal injury, are not affected by the subsection.

The answer turns on consideration of the nature of exemplary damages and on analysis of the provision considered in its statutory setting. The purposes of the Act could not be more deliberately stated than they are in s.4(1). As enacted in 1973, at the same time as s.5 was recast in its present form, that subsection provides:

"The purposes of this Act shall be -

(a) to promote safety with a view to preventing accidents and minimising injury;

(b) to promote the rehabilitation of persons who suffer personal injury by accident in respect of which they have cover under this Act so as to seek to restore all such persons to the fullest physical, mental, social, vocational, and economic

usefulness of which they are capable;

(c) to make provision for the compensation of

(i) persons who suffer personal injury by accident in respect of which they have cover under this Act; and

(ii) certain dependants of those persons where death results from the injury.

That theme of prevention of accidents, of rehabilitation of accident victims and of compensation for them and their dependents, is reflected in the detailed provisions of the legislation, particularly Part II relating to prevention and rehabilitation and Part IV relating to the compensation to be paid out of the statutory funds. Section 4(1) does not go on to repeat the statement in the long title that it is also an Act to make provision "for the abolition as far as practicable of actions for damages arising directly or indirectly out of

personal injury by accident and death resulting therefrom and certain other actions." That omission may well have been due to two considerations: the first, that the barring of such actions may have been viewed as a consequence of providing a statutory entitlement to compensation in such cases; and the second, that it may have been considered unnecessary to restate that object of the legislation when the next section proceeds to spell out how far it is considered practicable to exclude claims for damages for personal injury by accident.

Section 5 needs to be seen in that statutory context. That section was recast in 1973, a few months after the 1972 Act was passed and before the new statutory scheme came into effect. In terms of the original subs (1) "no

action [would] lie for damages in respect of" personal injury by accident or death arising from such injury if there was cover under the Act in respect of personal injury by that accident.

The new section expanded on that provision. Subsections (1) and (2) must be read together. They provide:

"(1) Subject to the provisions of this section, where any person suffers personal injury by accident in New Zealand or dies as a result of personal injury so suffered, or where any person suffers outside New Zealand personal injury by accident in respect of which he has cover under this Act or dies as a result of personal injury so suffered, no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any Court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule of law or any enactment.

(2) Without limiting the generality of subsection (1) of this section, the action for loss of services (known as the

action per quod servitium
amisit) and for cause of action
for loss of consortium (known
as the action per quod
consortium amisit) are hereby
abolished."

The change from "no action shall lie. .
." to "no proceedings. . . shall be
brought" is more a matter of semantics
than substance. The more important
change is the substitution of "damages
arising directly or indirectly out of
the injury or death" for "damages in
respect of injury or death". No doubt
it was intended to emphasise that,
however arising out of injury or death,
the damages in question could not be
recovered. Apart from that I do not
find the statutory history of any
assistance in applying s.5 in the
present case.

The function of subs (1) is clear
enough and its scope is limited. Its
sole concern is to prohibit suits for

damages in certain cases. It does not abolish causes of action for battery or other trespass to the person. Unlike subs (2), which expressly abolishes the action for loss of services and the cause of action for loss of consortium, subs (1) is concerned with remedies and leaves rights of action intact. It bars proceedings for damages but only where those damages arise directly or indirectly out of injury or death. It is not sufficient that the cause of action should arise out of the injury. The particular damages sought to be recovered must do so. The remaining question, then, is whether it is correct to say, where the cause of action is battery, that exemplary damages arise out of the injury suffered.

It is well settled that ordinary damages (including aggravated damages)

and exemplary damages serve essentially different purposes: the former are compensatory; the object of the latter is to punish and deter (see the discussion in our contemporaneous judgments in Taylor v Beere).

Accordingly it cannot in my view be said that exemplary damages in battery arise out of injury sustained by the plaintiff. The damages are not compensatory at all. They are not directed to the loss sustained by the plaintiff. They are awarded against the defendant because of the outrageous manner in which he has conducted himself in the course of committing the tort. In a strict sense it may be said that they arise out of the acts of the defendant. It does not follow that their source is the personal injury sustained by the plaintiff. In determining

liability for exemplary damages, it is the quality of the defendant's conduct which is in question not whether the plaintiff has suffered a particular type of harm.

The focus of subs (1) is different. It is on the injury received. It is not an apt use of language to say that exemplary damages arise even indirectly out of personal injury suffered by the plaintiff. For these reasons I consider that, on a fair reading of the provision in its statutory context and giving the words their ordinary meaning, the subsection does not reach proceedings for exemplary damages.

Up to this point I have not referred to the objects of the relevant statutory provisions. On my reading of the statute there are no particular policy reasons discernible in the legislation

for barring recovery in such a case but allowing it in other cases of trespass to the person (for example, assault and false imprisonment) where the intentional application of force (although it may have occurred) is not an ingredient of the cause of action relied on. And I do not find it helpful to discuss more general policy considerations in this area of accident compensation which are not expressed in the legislation itself.

Finally, it is of some interest, although not bearing directly on the construction of s.5, that s.45A of the Criminal Justice Act 1954 contemplates in the context of punitive action the possibility of recovery of damages notwithstanding the receipt of accident compensation. That section, as enacted in 1975, provides for payment of compensation to the victim of an offence

arising out of an act or omission causing bodily injury of not more than one half of the fine imposed on the offender. In doing so it expressly states that an award of such compensation shall not affect the right of the person entitled to it to receive compensation under the Accident Compensation Act 1972 and to recover by civil proceedings damages in excess of the amount of the award.

Mr. Inglis's next argument was that exemplary damages can be awarded only in cases where compensatory damages are also awarded. As a matter of principle it is difficult to see why a plaintiff who has a cause of action should not be entitled to select his remedy and to pursue a particular remedy notwithstanding that another remedy is not available, at least where the two

remedies serve quite different purposes. The plaintiff in the present case alleges the commission of the torts of assault and battery. They are based on the ancient action of trespass. The application of force to the person of another without lawful justification amounts to the wrong of battery. This is so however trivial the amount or nature of the force may be and even though it neither does nor is intended nor is likely or able to do any manner of harm (Salmond on The Law of Torts [17th ed] 120). Assault is the act of causing the plaintiff to entertain a reasonable fear or apprehension of immediate battery. Those torts are actionable without proof of damage. That being so I see no reason in principle why a plaintiff should not sue in battery for exemplary damages alone.

I turn to consider the authorities. In the trilogy of English cases decided in the 1760's involving complaints of high handed conduct by officials which were discussed by Lord Devlin in Rookes v Barnard it does not seem that the Judges considered it material to the award of exemplary damages whether there was also an award of compensatory damages. In each of the cases there was a single lump sum award and in each it was the exemplary principle that attracted consideration.

In Wilkes v Wood (1760) 3 Lofft 1; 98 ER 489, the plaintiff sought "large and exemplary damages" for the actions of officials in searching his house under a general warrant. Pratt LCJ in his direction to the jury said (pp 18-19; 498-499):

"Damages are designed not only as a satisfaction to the in-

jured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself."

The jury awarded L1000.

In Huckle v Money (1763) 2 Wils. KB 205; 95 ER 768, the plaintiff, a journeyman printer earning one guinea per week, had been taken into custody on suspicion of having printed Number 45 of the North Briton. It is recorded in the report that he was kept in custody for six hours but that the custodian had used him "very civilly by treating him with beefsteaks and beer, so that he suffered very little or no damages". The jury gave him L300 damages. A new trial was sought on the ground that the figure was "most outrageous". The award was upheld and Lord Camden LCJ, after observing (p 206; 768) that "the personal injury done to him was very

small, so that if the jury had been confined by their oath to consider mere personal injury only, perhaps £20 damages would have been thought sufficient", went on to uphold the giving of exemplary damages for the manner in which arbitrary power had been exercised.

Three years later, in Benson v Frederick (1766) 3 Burr 1835; 97 ER 1130, an award of £150 was upheld against a colonel who, to get back at a major, had the plaintiff militiaman flogged. Once against the cause of action was respass to the person. Although in this instance physical hurt and affront to the plaintiff's dignity had been inflicted the damages were, in Lord Mansfield's words (p 1846, 1130), "beyond the proportion of what the man had suffered." In upholding the award

all three Judges, Lord Mansfield CJ, Wilmot and Ashton JJ, emphasised the arbitrary conduct of the colonel.

Neither in these authorities nor in later reported cases in England and Commonwealth jurisdictions upholding awards of exemplary damages which have come to my notice, has it been held that exemplary damages could be awarded only where there was an award of compensatory damages or an element of compensation in the global award. Rookes v Barnard [1964] AC 1129 and Broome v Cassel & Co Ltd [1972] AC 1027 contemplate a single award covering both ordinary and exemplary damages following a direction to the jury that (per Lord Devlin et p 1228) "if, but only if, the sum which they have in mind to award as compensation. . . is inadequate to punish him for his outrageous conduct, to mark

their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum." However, neither in Rookes v Barnard nor in Broome v Cassel were their Lordships called on to consider a situation where the plaintiff was not claiming compensation from the defendant and I do not read any of the judgments as expressing a view on the point now in question. The only qualification in this respect expressed by Lord Devlin in Rookes v Barnard (at p 1227) was that the plaintiff seeking exemplary damages should be the victim of the punishable behaviour. He went on immediately to add that the anomaly inherent in exemplary damages would become an absurdity if a plaintiff totally unaffected by some oppressive conduct which the jury wished to punish obtained

a windfall in consequence. I think it is not without significance that Lord Devlin put the point in that way and did not say that the plaintiff must seek compensatory damages.

There is a wealth of American case law on the point raised by Mr. Inglis and it has been the subject of numerous discussions in legal periodicals. A uniform approach has not been taken. The authorities are collected in 25 CJS para 118 and are reviewed in the standard texts (for example, Prosser, pp 13-14; and for an extended discussion see Note, 17 ALR 2d 527). The preferred view expressed in the Restatement of the Law, Second, Torts 2d para 908 is:

"Although a defendant has inflicted no harm, punitive damages may be awarded because of, and measured by, his wrongful purpose or intent. . . In all these cases, however, a cause of action for the particular tort must exist, at least

for nominal damages. . ."

In some cases it has been held that punitive damages cannot be awarded unless there is an award of actual compensatory damages; in others, that punitive damages can be awarded where nominal damages only are awarded; and in yet others, that punitive damages can be awarded in the absence of an award of compensatory damages so long as such damage is shown to have been suffered. An illustration in the third category is Fort Worth Elevators Co v Russell (1934) 70 SW 2d 397; 123 Tex 128, where the Supreme Court of Texas held that, notwithstanding actual damages were not recoverable because of the workmen's compensation insurance legislation, the plaintiff, who established an entitlement to actual damages but for the compensation act, could recover

exemplary damages.

In this case the cause of action is complete without proof of actual damage. And s.5(1) does not preclude recognition in proceedings for damages not barred under its provisions of the existence of nominal damage arising out of a personal injury. What it bars is proceedings for recovery. Moreover, if I am wrong in the conclusion I have reached and exemplary damages must be founded on the existence of actual rather than nominal damage, it does not follow that s.5(1) bars proceedings for exemplary damages. It does not exclude proof that the plaintiff suffered a loss which is compensable under the legislation: it merely prohibits the bringing of proceedings for damages in respect of that loss.

I should perhaps add that I see no

substance in the argument that it would be difficult and unreal to conduct a trial of a claim for exemplary damages excluding evidence as to personal injury loss. It should not be difficult to bring home to a jury the need, when determining the damages, to exclude anything by way of compensatory (including aggravated) damages.

It does not follow from these conclusions as to principle that there should now be a trial in the High Court of the first appellant's claim for exemplary damages. The matters pleaded in paras 21, 22 and 23 of the reamended statement of claim are all directed to considerations which are relevant to the assessment of compensatory damages (including aggravated damages). As Mr. Barton right conceded, they have no real bearing on a claim for exemplary damages

and the pleadings would require further amendment. That in itself is not fatal to the appeal. What for me is decisive is the evidence of John Donselaar as set out in the judgment of Cooke J. That evidence supports the pleaded claim for what were in reality compensatory damages. It cannot in my view, when set in the context of the fraternal wrangling between John and Andries - in which as Quilliam J found John was the principle irritant - reasonably attract an award of exemplary damages against Andries.

I, too, would dismiss the appeal.

Richardson, J.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA 145/77

19 March 1982

JOHN DONSELAAR

v

ANDRIES DONSELAAR

JUDGMENT OF COOKE J.

In the litigation between the brothers John and Andrew Donselaar there is one issue of general importance. It was dealt with separately from the many others by the trial Judge, Quilliam J., and also at the hearing in this Court. We gave judgments on all the other issues forthwith but then heard argument on this remaining one and have taken time to consider it. The very unusual length of that time has been due partly to the other commitments of the Court

and partly to the difficulty of the issue.

In short the issue is whether actions for exemplary damages following assault or battery can still be brought in New Zealand notwithstanding the provisions of the Accident Compensation Act 1972. Quilliam J. held that the Act did not permit physical injury and a hurt to dignity and the like, if caused by the same conduct, to be separated so as to enable an action for damages to be brought for the second kind of consequences. The Judge accordingly struck out a prayer in John's reamended statement of claim whereby he sought such damages from Andrew for what was there described as an assault, alleged to have been committed on 1 October 1976. John appeals from that decision.

The reamended statement of claim

alleged in para 19 that on that day Andrew entered by force upon premises in Waterloo Road which John had held under a lease and so trespassed thereon and attempted unlawfully to exclude John. That cause of action has been disposed of by our affirmation of the finding of Quilliam J. that it was John who was a trespasser at 3 Waterloo Road that day, when he insisted on entering after the expiry of his lease and contrary to a consent judgment between the parties. Then in the reamended statement of claim it was alleged as a further or alternative cause of action:

"20. THE Plaintiff repeats the allegations contained in paragraphs 18 and 19 hereof.

21. THAT at the time and place aforesaid the First Defendant assaulted the First Plaintiff with a hammer thereby injuring the First Plaintiff.

22. THAT by reason of such assault the First Plaintiff was

rendered unconscious, has undergone pain and suffering and has required hospital and other medical treatment.

23. THAT as further consequences of the said assault the First Plaintiff has suffered substantial indignity, mental suffering, disgrace and humiliation.

On that cause of action - the fourth pleaded - John claimed from Andrew:

"(i) Exemplary or punitive damages \$5,000.00

(ii) An injunction restraining the First Defendant from molesting or assaulting the Plaintiff."

While denying the allegations in question, Andrew claimed that in any event the cause of action was precluded by the Accident Compensation Act and filed a motion for striking out. The Judge dealt with this motion on 28 July 1977, being the fourth day of the hearing of the action. As the claim for an injunction was not affected by the 1972

Act, he decided to strike out only the prayer for exemplary damages. He gave his reasons for holding that the Act prohibite this claim in an oral judgment, because it was desirable to rule on the matter without delay, and he said that his reasons were given in outline only. As a judicial response to this particular case his ruling loses nothing of value on that account. As will appear more fully later, however, I think that he was considerably and rightly influenced by the way this case was prsented to him.

By the stage when that ruling was given John had given evidence in chief and had been cross-examined. The relevant part of his evidence-in-chief is recorded as follows:

"Then I went into the premises, walked past Andrew and Mosen [an associate of Andrew] who were in the premises, walked up

to the partition which was blocked off by the car cases, I put my hand up to touch those car cases, was going to give pull on it, and then I was attacked by Andrew with a hammer. He hit me first on the left arm, then he hit me, I crouched down to try and avoid the blows covering my head with my arms, he hit me on the right arm and then he hit me on the left ear, on the side of the head, and knocked me unconscious. When you went back into the premises after the discussion with the police did you have the dog with you? Yes I did. Was it walking freely or did you have it on a leash? I had it on a leash. When Andries attacked you as you alleged a moment ago what happened to the dog? I put my arm up to defend myself, the dog, I let the dog go, and the dog took off. He ran away? He ran away. You related how you were hit on the head, what happened after that? I fell on the floor, I was semiconscious, I tried to speak, I couldn't speak very well, it was all blurry, I couldn't say much. I got up and I sort of stumbled towards the door, losing my shoe in the process. When I got to the door and got outside in the yard Dirk [another of the Donselaar brothers] was standing there, who was prevented from coming in by Mosen

with a piece of steel. When I got into the yard Dirk helped me to get in the car, he laid me out on the seat. He drove round to the police station and told them when they came out to have a look at me are you happy now with what has happened. Then he got behind the wheel again and drove to the hospital. The Lower Hutt Hospital? That is correct. How long were you in the hospital? They put me on a stretcher, for about two hours I would say. Then they came round and asked me questions, what happened, where I got hit, had I been unconscious and I said yes, for a couple of seconds. They said we will have to keep you here under observation for 24 hours. Was that how long you stayed in hospital. That's approximately how long, may be a little longer, 28 hours. As a result of the blow on the head was some damage done to your ear. My ear was split in half, it required stitches and I had a cut behind the ear and very nasty swelling. Did you have any aches and pains? I had headaches for about two weeks afterwards. What sort of aches? Just headaches, bad headaches. Was your face bandaged? The side of my face was bandaged around the ear. How long did you go around like that? About a week, I had to

go back to the hospital when they took the stitches and bandages off. When you went back into the premises after the police had gone and you had the dog with you, did you have any weapon at all in your hand? None at all. Was some comment made to you by customers from time to time about your injuries? A few laughs. It was regarded as a source of amusement was it? Well. . .I think its common ground you laid charge of assault. Yes. I never saw a policeman at all to tell him what had happened after the accident."

Andrew's version of the incident has not yet been given in evidence, because of the Judge's ruling, and if that ruling were reversed Andrew would have to be given an opportunity to call further evidence. In fairness to Andrew it should be mentioned that there may well be another side to the story. The Judge was satisfied after seeing and hearing the witnesses that 'the principal irritant in the relationship between the

two brothers is John and not Andrew'. As regards this particular incident John agreed in cross-examination that Andrew was charged with assault in a Magistrate's Court but that the Magistrate dismissed the charge without requiring to hear any witnesses for the defence. But this evidence, as well as being of highly doubtful admissibility, is in no way relevant to the general question of law that we are asked to decide. It will be necessary to return to the particular facts after considering the general question.

The Statutory Provisions

It is desirable to set out in full certain provisions of the 1972 Act, italicising the critical parts. The Long Title, as substituted in 1973, is:

"An Act to make provision for safety and the prevention of

accidents; for the rehabilitation and compensation of persons who suffer personal injury by accident in respect of which they have cover under this Act; for the compensation of certain dependants of those persons where death results from the injury; and for the abolition as far as practicable of actions for damages arising directly or indirectly out of personal injury by accident and death resulting therefrom and certain other actions."

The interpretation section, s.2, includes a non-definition of 'Personal injury by accident', substituted in 1974, which reads:

"Personal injury by accident" -

(a) Includes -

(i) The physical and mental consequences of any such injury or of the accident:

(ii) Medical, surgical, dental or first aid misadventure:

(iii) Incapacity resulting from an occupational disease or industrial deafness to the extent that cover extends in respect of the disease or

industrial deafness under
sections 65 to 68 of this Act:

(iv) Actual bodily harm
arising in the circumstances
specified in section 105B of
this Act, which section was
inserted by section 6 of the
Accident Compensation Amendment
Act 1974:

(b) Except as provided in the
last preceeding paragraph, does
not include -

(i) Damage to the body or mind
caused by a cardiovascular or
cerebrovascular episode unless
the episode is the result of
effort, strain, or stress that
is abnormal, excessive, or
unusual for the persons suf-
fering it, and the effort,
strain, or stress arises out of
and in the course of the
employment of that person as an
employee:

(ii) Damage to the body or
mind caused exclusively by
disease, infection, or the
ageing process:

Sections 4 and 5, as
substituted in 1973, read:

4. Purposes and scope of Act -

(1) The purpose of this Act
shall be -

(a) To promote safety with a

view to preventing accidents
and minimising injury:

(b) To promote the
rehabilitation of persons who
suffer personal injury by
accident in respect of which
they have cover under this Act
so as to seek to restore all
such persons to the fullest
physical, mental, social,
vocational, and economic
usefulness of which they are
capable:

(c) to make provision for the
compensation of

(i) Persons who suffer
personal injury by accident in
respect of which they have
cover under this Act; and

(ii) Certain dependants of
those persons where death
results from the injury.

(2) Subject to the provisions
of this Act, all persons shall
have cover under this Act in
respect of personal injury by
accident in New Zealand.

(3) In the cases and to the
extent specified in sections
60, 61 and 63 of this Act,
persons shall have cover under
this Act in respect of personal
injury by accident outside New
Zealand.

(4) No person shall have cover

under this Act in respect of personal injury by accident otherwise than under subsections (2) and (3) of this section.

5. Act to be a code - (1)
Subject to the provisions of this section, where any person suffers personal injury by accident in New Zealand or dies as a result of personal injury so suffered or where any person suffers outside New Zealand personal injury by accident in respect of which he has cover under this Act or dies as a result of personal injury so suffered, no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any Court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule of law or any enactment.

(2) Without limiting the generality of subsection (1) of this section, the action for loss of services (known as the action per quod servitium amisit) and the cause of action for loss of consortium (known as the action per quod consortium amisit) are hereby abolished. [*Italics in original.*]

(3) Nothing in this section shall affect -

(a) Any action which lies in accordance with section 131 of this Act; or

(b) Any action for damages by the injured person or his administrator or any other person for breach of a contract of insurance; or

(c) Any proceeding for damages arising out of personal injury by accident or death resulting therefrom, if the accident occurred before the 1st day of April 1974.

(4) . . .

(5) Where in any proceedings before a Court a question arises as to whether any person has cover under this Act, the Court shall refer the question to the Accident Compensation Commission for decision, and the Commission shall have exclusive jurisdiction to determine the question.

(6) The Commission may, on the application of any person who is a party to any proceedings or contemplated proceedings before a Court, determine any such question.

(7) Subject to Part VII of this Act, a subsisting decision of the Committee under subsections (5) and (6) of this section shall be conclusive

evidence as to whether or not the person to whom the decision relates had cover under this Act.

It has been necessary in considering this case to have regard to the provisions replaced by those I have quoted, but in the end I have not obtained any really significant help from the legislative history and prefer not to complicate this judgment by going into the details.

One other matter that should be mentioned at this stage is that neither side here suggests that any question raised by the appeal should be referred to the Accident Compensation Commission for decision, or that the Court is in any way deprived by the Act of jurisdiction to decide whether or not the plaintiff's action for exemplary damages can be brought.

Cases and Arguments

As to whether such an action can be brought since the Act, opinion among High Court Judges has varied. In the present case Quilliam J. pointed out that the means of punishing assaults was maintained by the right of prosecution and the power of the Courts to direct that part of a pecuniary penalty be paid to the person assaulted. The relevant statutory provision is s.45A of the Criminal Justice Act 1954, enacted in place of some old provisions in 1975. It gives the Court power to award half of a fine as compensation to the victim of an unprovoked assault which has caused bodily injury. It is expressed to be without prejudice to both the right to receive compensation under the Accident Compensation Act and to the right to recover by civil proceedings

damages in excess of the award. This suggests an assumption by Parliament but may have been no more than precautionary. It cannot, of course, revive a right if the Accident Compensation Act has taken that right away. Obviously that Act has at least curtailed the right to damages.

Quilliam J. went on to hold that, in referring to damages arising directly or indirectly out of personal injury by accident, s.5(1) of the Accident Compensation Act was intended to relate to both branches of damages, compensatory and exemplary. As he put it, 'The foundation of the right to claim exemplary damages is still assault which has caused injury'. White J. took a similar view in Koolman v Attorney-General (Wellington, A.519/76; judgment 3 October 1977).

But in Howse v Attorney-General (Palmerston North, A.132/75; judgment 22 December 1977) O'Regan J., while accepting that the Act prevented claims for aggravated damages, held that punitive damages could still be awarded, on the ground that they arise 'from the acts done contrary to law and not from the harm caused to the plaintiff by such acts. The harm done him is met by the award of aggravated compensatory damages. It is the Act contrary to law which is punished by punitive damages and it is recurrences of such which are deterred by such damages'.

Then in Betteridge v McKenzie (Wellington, A.103/77; judgment 7 December 1978) Jeffries J. felt forced to disagree with Howse, preferring the approach in the two earlier cases and adding 'I am tolerably certain the

legislature did not wish to leave to injured persons the right to impose private fines on wrongdoers when there are ample avenues available elsewhere, if the circumstances call for it'. And in Stowers v Auckland City Council (Auckland, A.1064/77; judgment 2 May 1979) McMullin J. undertook an extensive review of the competing considerations and previous cases, as a result of which he agreed with Quilliam J.'s conclusions in the present case. But he adverted to the distinction between battery and assault and saw the theoretical possibility of an action for assault (intentionally creating in another person an apprehension of imminent harmful or offensive conduct) where there had been, as he put it, 'no personal injury, physical or mental'. Such a case would not be, he thought,

one of 'personal injury by accident' within the meaning of the Act, so proceedings for damages would still lie.

Next came the judgment of Pritchard J. in Lucas v Auckland Regional Authority (Auckland A.1003/79; judgment 24 March 1980), a case of pursuit of a motorist's car by traffic officer. Collisions occurred but there was no allegation or evidence of physical injury to the plaintiff. The Judge awarded 'aggravated or exemplary damages' of \$1000 for high handed conduct on the part of the officer. He did not treat these as arising out of any injury to the plaintiff's feelings, but did say:

"Aggravated and exemplary damages, although treated as a separate head in assessing damages, are essentially an augmentation - for special reasons - of compensatory damages recoverable by the Plaintiff on a substantive

cause of action. A claim for aggravated or exemplary damages can, therefore, never survive, independently, on its own roots. To exist, successfully, it has to be granted on to some cause of action entitling the Plaintiff to compensatory damages. From the nature of the case, the root-stock on to which is grafted the claim for aggravated or exemplary damages - the substantive cause of action to which the claim for aggravated or exemplary damages has to be related - is almost invariably a cause of action in tort and very commonly a tort involving personal injury to the Plaintiff. It follows that in order to determine whether a claim for aggravated or exemplary damages is within the ambit of the exclusive jurisdiction of the Accident Compensation Commission, one must have regard not only to the facts which are alleged to be special reasons for allowing such damages: one has to go beyond that; identify the basic or substantive cause of action, and see whether that is a claim in respect of personal injuries.

It may be possible, without mentioning or referring to personal injuries, to plead and prove the reasons advanced for augmenting the damages. But once it is seen than an element

of the substantive cause of action is an injury to the person, it follows that the claim for aggravated or exemplary damages is a claim for damages arising out of personal injuries - and so within the exclusive jurisdiction of the Accident Compensation Commission."

In the argument of the present case in this Court, Mr. Barton's position was that 'exemplary damages' is a misnomer, as they represent in truth not damages, at least not to the plaintiff, but a means of marking the Court's disapproval of contumacious and insolent conduct. Perhaps not altogether consistently, he said that in such a case as this they do not arise out of any personal injury but out of the invasion of what he called 'the right of personal inviolability'. He added, nevertheless, that it was not a question of compensating John for any mental consequences (such as indignity) of his injury - a contention clearly

inconsistent with the reamended statement of claim and with Quilliam J.'s understanding of the basis on which the plaintiff sought damages. Mr. Barton was not engaged in the Court below.

On the other hand Mr. Inglis submitted that there are not three separate remedies - compensatory, aggravated and exemplary damages - but only one remedy, damages, the level of which may be raised in some cases on the ground of aggravation and in a few cases higher still to mark the Court's disapproval of conduct and to discourage its commission. No award of damages based solely on exemplary or punitive factors can be made, he said, unless the plaintiff's cause of action entitles him to compensatory damages 'even if his loss which would justify compensatory damages is only nominal'. Accordingly

Mr. Inglis argued that, no matter how John's claim was framed, it must amount to seeking damages arising directly or indirectly out of personal injury by accident.

For the purposes of the argument counsel for the respondent assumed, without conceding, that the power to award damages in New Zealand is not limited by Rookes v Barnard 1964 A.C. 1129. As is well known, in that case Lord Devlin in the House of Lords clarified the distinction between aggravated and exemplary damages and limited the award of the latter in England in future to (for practical purposes) two classes of case: oppressive, arbitrary or unconstitutional action by persons within a category described shortly as servants of the government; and (again sum-

marising) cases where the defendant's action has been influenced by the prospect of making a profit for himself in excess of any compensation he might have to pay to the plaintiff. In Australian Consolidated Press Ltd v Uren 1969 1 A.C. 590 the Privy Council accepted that the same limitations did not necessarily apply in other Commonwealth countries, declining to disturb the settled view in Australia that exemplary damages could be awarded for libel even in cases regarded as not falling within the second category in Rookes v Barnard.

Exemplary Damages apart from the
Accident Compensation Act

Although there is not a great deal of reported New Zealand authority on the point, and none that could be said to be

compelling, I do not doubt that professional and judicial opinion in New Zealand, both before and after Rookes v Barnard, has generally tended to the view that exemplary damages may be awarded in this country in some tort cases outside the two categories. So far as defamation is concerned we are dealing with the question contemporaneously in Taylor v Beere. McComb v Low (1873) 1 N.Z. Jur. 49 is an early instance of recognition of a jury's right to give exemplary damages for malicious prosecution. To take an example from much more recent times, it is significant that as experienced a Judge as McGregor J. could say in Fogg v McKnight 1968 N.Z.L.R. 330, 333, that in New Zealand the approach and policy of judicial decision seems to have recognized that exemplary damages may be

recovered in respect of an assault.
That case concerned an assault by a
store detective.

Lord Devlin might retort that the
difference between aggravated and
exemplary damages, and particularly the
extensive scope of aggravated damages,
had been inadequately explored here; and
that the award in Fogg v McKnight did
not in fact go beyond aggravated
damages, being for assault accompanied
by injury to feelings. Nevertheless I
respectfully think that a high handed
trespass, whether to person or property
and whether by a public officer or a
private citizen, is the very type of
case in which the power to include some
punitive element in the damages awarded
to the victim might occasionally be
found to satisfy the community's sense
of justice. And despite the overruling

of Loudon v Ryder, 1953 2 Q.B. 202 in Rookes v Barnard, the same idea seems to die hard in England: see the observations in Broome v Cassell & Co. 1972 A.C. 127 of Lord Hailsham of St. Marylebone L.C. at 1078, Lord Morris of Borth-y-Gest at 1098, Viscount Dilhorne at 1109-11, and Lord Wilberforce at 1114 and 1120-1. The last passage is especially significant, as Lord Wilberforce does not disguise his misgivings about the narrowing effect of Rookes v Barnard.

The Statutory Bar

So I approach this case on the footing that, apart from the Accident Compensation Act, it is a kind of case in which if the plaintiff proved that the defendant acted with contempt for his rights as a citizen, the tribunal of

fact (whether Judge or jury) would have a discretion to include in the damages awarded something punitive: provided however that the tribunal found that compensatory damages, including any elements for aggravation, were not enough to punish the defendant. The proviso is important, and I shall return to it shortly.

On turning to the Accident Compensation Act the first matter that must be mentioned is that it is common ground that the plaintiff's allegations, set out in his reamended statement of claim and supported by his evidence, amount to or at the very least include allegations that he suffered personal injury by accident in New Zealand, within the meaning of the Act. It is immaterial that there may have been a deliberate attack by the defendant. It is from the

viewpoint of the person who suffers the injury that the matter has to be seen for the purposes of the Act. Henry J. so held in G. v Auckland Hospital Board 1976 1. N.Z.L.R. 638, a rape case, and no one doubts that this is right.

It is obvious from the Long Title, section 4 and the provisions of Part VI of the Act (which is headed 'Compensation') that it does not have any punitive purpose. Whether it nevertheless excludes exemplary damages is not an easy question. There is attraction in the view that in the public interest the Courts are left free to recognize and develop exemplary damages as an independent remedy.

The 'mischief' which the Accident Compensation Act set out to remedy must have been primarily the uneven and inadequate scope of common law negligence

actions as a means of securing compensation for personal injury in modern society. There is no reason to suppose that any suggested deficiency in the common law remedies for intentional wrongs was a real source of concern. In his book Compensation for Incapacity at p. 271-8 Dr. Geoffrey Palmer discusses the extent to which the statutory scheme replaces the common law. The tenor of what he says is that the precise extent is in several respects a somewhat technical question, peripheral to the essential sweep of the Act. He expresses certain opinions which I find it valuable to quote:

"Which is the better view will no doubt be settled by the Court of Appeal as will the associated issue of the range of punitive damages at New Zealand law. The opportunity to sue should perhaps be restricted to official conduct. Private vengeance is not an admirable trait to encourage.

The range of situations in which the action for punitive damages survives in a personal injury situation will not be great. The conduct will need to be wanton, so that it is unlikely that anything but an intentional tort would be involved. There do not seem to be many personal injury situations outside battery where there will be any scope for an action. That small category of cases consisting of intentional physical harm to the person not amounting to trespass, such as the use of spring guns, may be included, but a deluge of litigation seems improbable. It would be unfortunate, however, if the decision of O'Regan J. were regarded as a wide invitation to bring actions for heads of damage not compensated by the Act, even though personal injury by accident occurred. Certainly his reasoning does not support such an extension.

To sum up, it is suggested that section 5 should be interpreted as barring all actions for damages, save punitive damages in the narrow range of circumstances in which they should be available, where personal injury by accident is covered under the Act. The analysis cannot stop here. It is necessary to consider, both under section 5 and for the

purposes of determining cover, what amounts to personal injury by accident. If there is no personal injury by accident the proceedings are not barred.

* * *

The torts discussed protect the value of dignity, although in some circumstances the events could also incapacitate a person and cause loss of earnings. That would probably be uncommon. The emotional harm tort is only developing as yet. It may be best to interpret the Act as excluding all assaults and thereby avoid problems about the range of other intentional torts so excluded. Thus the common law would be free to develop in a fastidious direction and to respond to new social needs. The number of cases will not be many. The threat to the integrity of the accident compensation system will not be significant."

For present purposes the significance of those passages is that they are evidence that to preserve exemplary damages, for whatever may be their true common law role, would not be to fail to grasp the social philosophy represented

by the 1972 Act. Of course it does not follow that all associated with the legislation share the author's view as to exactly how the common law should develop. Nor am I here concerned to agree with or even express a view on all his suggestions. As it happens I cannot help thinking that the distinction between 'official' and 'private' is simplistic. The important point is that it is a fair inference that the social reformers whose ideas inspired the legislation did not deliberately set out to do away with exemplary damages would be free to develop in a fastidious direction and to respond to new social needs. The number of cases will not be many. The threat to the integrity of the accident compensation system will not be significant."

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ficance of those passages is that they are evidence that to preserve exemplary damages, for whatever may be their true common law role, would not be to fail to grasp the social philosophy represented by the 1972 Act. Of course it does not follow that all associated with the legislation share the author's view as to exactly how the common law should develop. Nor am I here concerned to agree with or even express a view on all his suggestions. As it happens I cannot help thinking that the distinction between 'official' and 'private' is simplistic. The important point is that it is a fair inference that the social reformers whose ideas inspired the legislation did not deliberately set out to do away with exemplary damages following assault or battery.

The question then becomes whether

that head of damages can remain in a practical way consistently with the actual provisions of the 1972 Act. Here there are two main difficulties that must be faced frankly.

In the first place, when personal injury has been inflicted on a person by what is commonly called an assault, and in legal language is often a combination of assault and battery, it is obviously arguable that in the natural and ordinary use of words a claim for exemplary damages against the assailant does arise 'indirectly out of the injury'. It is true that such damages are not given for the injury to his or her body or feelings; but it is just because the plaintiff has been the victim of the conduct regarded by the Court as reprehensible that such damages are claimed. The Judge or jury would

have no right to award the plaintiff damages as a punishment to the defendant unless a link between the defendant's conduct and the plaintiff were established. When the link is bodily injury to the plaintiff, or mental distress suffered by the plaintiff, it may seem a little unreal to say that the damages do not arise indirectly out of 'the physical and mental consequences of ... the accident'. However, the point is a purely semantic one on which two views are open; and it need not be treated as decisive if one thinks, as I do, that Parliament did not have the problem of exemplary damages in mind.

In the second place there is a practical problem. If one point more than any other emerged from the examination of exemplary damages made in Rookes v Barnard and Broome v Cassell,

it was that the questions of compensatory damages and exemplary damages are overlapping and cannot be considered in isolation.

In Rookes v Barnard at 1228 Lord Devlin stressed that 'In a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum'. This was endorsed and emphasised by all the members of the House in Broome v Cassell. The theme runs throughout the speeches in that case. Indeed it was the view that

the summing up of the trial Judge in that case had not made the inter-connection clear to the jury that was the first reason for the dissents of Viscount Dilhorne, Lord Wilberforce and Lord Diplock. Those Law Lords thought that the summing up had not made it clear that something more could be added as exemplary damages only if the sum contemplated for compensatory (including aggravated) damages was itself inadequate as a punishment for the defendant.

An award of exemplary damages alone, unaccompanied by even nominal damages on any other head, might itself look something of an oddity. It would seem from Prosser on Torts sec. 2 that this is so even in the United States, where among the various jurisdictions some authority may be found for most theses concerning

tort law. Indeed Prosser records as to punitive damages that 'The greater number of courts have said that they are limited to cases in which compensatory damages are found by the jury'. But the difficulty arising from the House of Lords analysis goes deeper for us. To set about assessing exemplary damages without the possibility of saying that aggravated damages are enough punishment would be to travel into terra incognita on a course never contemplated by their Lordships.

But whatever novelty is involved has to be balanced against other considerations. Adapting some of the words of Lord Wilberforce (1972 A.C. at pp. 1119-20), I think that there is a need to have effective sanctions against the irresponsible, malicious or oppressive use of power; and also to maintain a

punitive remedy for the commonplace types of trespass or assault, if accompanied by insult or contumely, which touch the life of ordinary men and women. The sphere is one of those recognized by the Privy Council in the Australian Consolidated Press case, in that a decision has to be made as to the policy of the law and the needs of the particular country have to be judicially assessed.

It is a matter of everyday observation that New Zealand society has become more vocal, factional and discordant. There is a scepticism about established institutions. Allegations of misuse of power by the police and other authorities seem quite common. Individuals and groups are readier to pursue their goals by protests and similar action, sometimes on or beyond

the fringes of the law, no doubt because rightly or wrongly they feel driven to such courses.

Perhaps not all of this is unhealthy. And perhaps the appearance of a rather restive and abrasive surface gives partly a false impression, leading one to underestimate the extent of broad social unity underneath. But at all events this is no time for the law to be withholding constitutional remedies for high handed and illegal conduct, public or private, if it is reasonably possible to provide them. It would be absurd to suggest that such isolated awards of exemplary damages as may occur will be a panacea for the country's social ills. On the other hand a useful weapon in the legal armoury should not be sacrificed without compelling reason.

All in all, in a situation where the

right course for this Court is far from self-evident I think that we should try to meet a problem occasioned by the Accident Compensation Act by consciously moulding the law of damages to meet social needs. The only feasible way of doing so, without intruding into the field of compensation which the Act has taken over, appears to be to allow actions for damages for purely punitive purposes; and to accept that, as compensatory damages (aggravated or otherwise) can no longer be awarded, exemplary damages will have to take over part of the latter's former role. In other words, as benefits under the Act are in no sense punitive, exemplary damages will have to do not only the work assigned to them by Broome v Cassell but also some of the work previously done by the other heads of

damages.

The Courts will have to keep a tight rein on actions, with a view to counter-
ing any temptation, conscious or
unconscious, to give exemplary damages
merely because the statutory benefits
may be felt to be inadequate. Im-
moderate awards will have to be dis-
couraged. Trial Judges will have to be
clearly satisfied that the case is a
proper one for considering exemplary
damages, bearing in mind the kind of
conduct which such damages are designed
for, and not lightly to allow a claim to
go to a jury. Cases of this kind are
apt to raise difficult questions of
mixed law and fact for which trial with
a jury may not be appropriate; the
present case is an example. Whether a
case is one which may reasonably be
considered fit for an award, and the

level of damages, are matters which at times may have to be scrutinised carefully on appeal also.

If, such precautions notwithstanding, unmeritorious claims are successfully brought in any numbers, the remedy of abolishing exemplary damages for certain classes of case is in the hands of Parliament.

The present case is also an example, in my opinion, of a claim for exemplary damages that should not be entertained. The way in which the first plaintiff's case was pleaded and his evidence led at the trial suggests that, despite the use of the words 'exemplary or punitive' in the prayer for relief, in substance what were being sought were damages for physical injury and injured feelings. The reamended statement of claim refers to being rendered un-

conscious, pain, suffering, indignity, mental suffering, disgrace and humiliation. John's evidence in chief was directed to supporting these allegations. Quilliam J. was right in holding that an action for any sort of damages for such consequences cannot be brought since the Accident Compensation Act. Although Mr. Inglis did not rely on the pleading point in answer to the appeal, this Court is not bound to countenance a reshaping of the case on appeal; what was argued before Quilliam J. is not entirely clear, but the Judge was entitled to deal with the claim as pleaded.

Even disregarding the plaintiff's pleadings, the evidence shows a long feud between two brothers; an incident in which, according to one brother, is that the other went too far by attacking

him with a hammer. Evidently there was some provocation, as John's actions were contrary to the spirit and the letter of the consent judgment. On the evidence of the first plaintiff himself, taken as a whole, a prima facie case for the serious and exceptional remedy of exemplary damages was not made out. On the contrary it is manifestly a case where that remedy should not be granted. On that ground I would uphold the Judge's ruling.

The Court being unanimous, the appeal on this issue will be dismissed but, in accordance with the judgment disposing of the other issues on appeal, there will be no order for costs.

Cooke, J.

IN THE COURT OF APPEAL OF NEW ZEALAND

C.A. 38/80

19 March 1982

ALISTER TAYLOR

VS

MARGARET LORRAINE BEERE

JUDGMENT OF COOKE J.

The defendant in a libel action appeals from the refusal of the trial Judge, White, Jr., to order a new trial after the jury had awarded the plaintiff \$12,500 damages. The award almost certainly included some element of exemplary damages, and the appeal turns on whether in New Zealand law these are recoverable for defamation in this kind of case.

The plaintiff has five children and seven grandchildren. She had a photograph taken by a skilled amateur photo-

grapher, Hilary Watson, of herself with one of her granddaughters in her living room. The statement of defence describes it well, saying that it 'depicts an attractive older woman in the company of an attractive little girl plainly happy in each other's company'. The plaintiff discovered that the defendant, whom she knew personally, had somehow obtained a copy of this photograph and was proposing to publish it in a book about sex. She objected both orally and in writing, but he went ahead. The book was called 'Down under the Plum Trees'. It is aimed, or purports to be aimed, at school boys and girls, and might be called largely a manual of sex instruction. It contains some 287 pages, mainly of text but with numerous photographs and other illustrations. Some of these are innocuous, many depict

sexual techniques and organs. After publication it was classified (in March 1977) by the Indecent Publications Tribunal as 'indecent in the hands of persons under 18 years of age unless such persons are being instructed by parent or professional advisers'.

The immediate context of the photograph in the book is some text in which a small girl describes staying with her 'old, grumpy and ugly' grandmother. There is nothing of a sexual nature in this account. The plaintiff's complaint relates to the inclusion of the photograph in a book of this kind. The defamatory meanings pleaded are:

THAT by the publication of the said photograph and/or by the publication of the said words and/or by the publication of the said photograph and the said words as part of the said book the Defendant meant and was understood to mean that the

Plaintiff had consented to the use of her photograph in the said book and had thereby approved or condoned the said book and/or that the Plaintiff was a person who is willing to approve and be associated with an indecent document or a document closely bordering on the indecent and/or that the Plaintiff had in consideration of a money payment allowed a photograph of herself and her granddaughter to appear in an indecent document.

The Judge ruled that the publication was capable of conveying each of those meanings. The jury must have found that it did convey one or more of them. In the memorandum of grounds of appeal there was a ground to the effect that the 'innuendo' pleaded should not have been left to the jury. In support reference was made to a list of photographic credits at the back of the book, which gave Hilary Watson's name for this photograph and included a note saying that apart from many photographs

commissioned by the authors and publisher all other copyrights were held by individual photographers. But it is obvious that many readers, probably the great majority, would not study the list or direct their minds to fine implications as to copyright; and Mr. Ellis rightly acknowledged in argument in this Court that he would not dispute that the publication was capable of being defamatory of the plaintiff as alleged and that the jury were entitled to award some damages.

At the trial the evidence was quite short. The plaintiff, after outlining her life and giving some particulars about her family and her membership of school committees, said that about the middle of 1976 it came to her notice that the defendant was intending to use the photograph in a book. She had not

authorised Hilary Watson or anyone else to use it for publication. She was very angry and upset and rang the defendant. He said that it was a particularly charming photograph, and she said that this was beside the point and she would not want it used for any publication, let alone that particular one. He asked her to think again and said that he would send her a copy of the text going with it. She said she was not likely to change her mind and asked him to send 'back' the photographs and negative to her. She did not receive them (nor any copy of the text). The following week she wrote the defendant a letter, of which she kept a copy, saying that she definitely did not want any photographs of herself to be published in any publications and would be obliged if he would forward any copies of photographs

and negatives he had of her. (Receipt of that letter by the defendant is not disputed.)

That was in July. In November or December it came to her notice that 'Down under the Plum Trees' had been published with the photograph included. She was astounded, horrified and extremely angry. She noticed a change in the attitude to her of people in the village shops - they were definitely cooler and 'perhaps a more critical feeling'. Seven friends altogether approached her about the book; she explained that the photograph was there without her consent.

In cross-examination she said she found out about the defendant's intention from one of her daughters, who was a friend of his. When she spoke to the defendant on the telephone, he did not

say that it was in the hands of the printer or too late. She agreed that the second print of the book after the first 10,000 did not contain the photograph.

The plaintiff's family doctor gave evidence of her bringing up her family and the children's love and respect for her. An acquaintance of the plaintiff, Mrs. Tan, gave evidence of picking up the book at a friend's house and recognising the photograph of the plaintiff; she thought it was a poor quality book, not in very good taste, and went to see the plaintiff and asked her why she had given permission and wanted to be in the book. A Mrs. Howe, who looked through the book in a book shop, gave evidence on similar lines. She said she 'scarcely believed my eyes. I couldn't understand why she

wanted her photo in this kind of publication'. In cross-examination she said that when she found out later that the plaintiff had not consented she 'never thought badly of her'.

One of the plaintiff's daughters, Mrs. Lum, gave evidence confirming that her mother had written to the defendant telling him that she did not want her photograph appearing in the book. Mrs. Lum is a librarian employed in the Auckland Public Library; she said that the library had several copies of the first printing of the book; they were very well used. It was available in a restricted way in the library.

Another daughter, Mrs. Winter, was called for the plaintiff on subpoena. She confirmed that it was from her that the mother learnt about the proposed book. Mrs. Winter herself had been told

about it by the defendant. She made to him a strong statement regarding her opinion of that sort of book written by the particular authors, and he laughed and said 'Well, your mother's going to be in it and your daughter'. He regarded the whole thing as a joke.

No evidence was called for the defence. By consent an exhibit was put in showing that of the first printing of 10,000 all were ultimately sold; and of three further printings, without the photograph, of respectively 3500, 2400 and 2500, all but 1100 of the last printing had been sold to date (apparently May 1979). There was a note that gross sales should be reduced by approximately 10 per cent for defectively bound copies. It is evident that the book sold very well.

In his summing up White J. told the

jury that compensatory damages might include any social disadvantage caused among friends or acquaintances. It might be of short duration but nevertheless hurtful; sometimes it had a lasting effect. What perhaps they might think an important head in this case was any natural injury to a plaintiff's feelings, distress arising from a reference in defamatory terms - a matter of distress personal to the plaintiff, not of course to the grandchild's mother. Then in the light of the way in which the plaintiff's case had been presented, he said this:

In arriving at an award of general damages in this case Mr. Goddard has submitted to you that the sum should be higher because, as he puts it, exemplary or punitive damages should be awarded to mark the jury's disapproval of conduct which is marked by vindictiveness, arrogance and complete disregard of the plaintiff's rights in the

matter. Those are my words but that is summing up, I think, what he said. Well, that is open to you to consider. But before you award exemplary damages, that is, increase the amount because of such things as that, it is necessary for the jury to be satisfied that there is something in the nature of outrageous conduct calling for an element of punishment over and above the sum that I have been talking about up until I mentioned this as fair, reasonable damages by way of compensation. So I direct that you consider exemplary damages in that way in this case. It is for you to consider the conduct and decide whether it was of a degree falling into that category. If you consider it was, then you are entitled to increase (in a way - that is a way of looking at it - I don't want you to get into your mind of speaking of two heads) - the award can be higher because of that, to the extent that should be reflected in your view in the award of general damages. If you are considering that and dealing with that - it is important too to consider when you are considering any heads of general damages, to be careful not to award damages twice for the same thing, and bearing in mind how you approach the whole matter of the defendant's

conduct in considering the effect of what happened on the plaintiff's feelings, dignity, pride, in fixing compensatory damages.

The Judge went on to give the jury advice of a standard kind about arriving at a fair and reasonable sum, and being careful not to be niggardly on one side or over-generous on the other. During their deliberations the jury returned with a question, asking the Judge to define 'ridicule' and 'humiliation', which he did. He mentioned that he did not recall the latter word being used by himself or counsel. The case centres on whether the passage in the summing up quoted above is a correct indication of what was open to the jury under the law of this country.

Until the nineteen-sixties I believe that it was standard practice in New Zealand in defamation cases to sum up in

accordance with the rule formulated by Lord Esher M.R. in Praed v Graham (1880) 24 Q.B.D. 53, 55, - 'the jury in assessing damages are entitled to look at the whole conduct of the defendant from the time the libel was published down to the time they give their verdict. They may consider what his conduct has been before action, after action, and in court during the trial'. The law was so stated in the textbooks (e.g. 24 Halsbury's Laws of England, 3rd ed., para.207; Gatley on Libel and Slander, 5th ed. [1960] para.1018). It was elementary that malice was relevant, sometimes as an essential requirement to destroy a defence of qualified privilege or fair comment, but always as affecting damages. So far as I am aware, no need was felt to try to distinguish between

malice reflected in the manner of publication, which might aggravate the injury to the plaintiff's feelings, and malice in fact entertained but not manifested in that way, which might nevertheless weigh against the defendant by augmenting the damages. Punishment for malice or high-handed conduct was taken to be a legitimate purpose of libel damages. The global sum awarded for general damages was at large, subject to the control of the Court if in the circumstances no twelve reasonable jurors could have arrived at it.

There are not a great many reported New Zealand cases to support the foregoing, but Norton v Stringer (1909) 29 N.Z.L.R. 249, 256, contains a specific recognition by Denniston J. in the Supreme Court of the right to give

punitive damages; and, while the judgment of the Court of Appeal delivered by Williams A.C.J. is less specific at p. 272, it does emphasise that the question of damages is especially a jury one. That was a newspaper case, but there are slander cases containing express recognitions that exemplary or punitive damages may be awarded: Matheson v Schneideman 1930 N.S.L.R. 151, 160 (Myers C.J. and Blair J.) and Wah Jang v West 1933 N.Z.L.R. 235, 237 (Smith J.). Earlier Butler v Black 1920 N.Z.L.R. 17 (Stout C.J. and Chapman J.) was to the same effect, if less explicit.

At the bar in a limited but perhaps not minimal experience of libel cases I understood that the law was as just outlined. I am sure that in unreported cases over the years many summings up

have been given on these lines.

Then came the chapter of English law beginning with Rookes v Barnard 1964 A.C. 1129, 1220 to 1223, where Lord Devlin, with the general concurrence of the other members of the House, identified exemplary damages as an anomaly whose future scope should be restricted to a few classes of case. That was not itself a libel case but a passage in his speech at pp. 1127 restricted (according to one interpretation) the kind of libel cases in which such damages could be awarded. This speech was criticised by Lord Denning M.R. and his colleagues in the Court of Appeal in Broome v Cassell 1971 2 Q.B. 354; but its authority in English law was maintained by the House of Lords, with perhaps some softening of the rigidity of Lord Devlin's

classifications, in the latter case on further appeal (1971 A.C. 1027). In the meantime the Privy Council had held in Australian Consolidated Press Ltd v Uren 1 A.C. 590 that Rookes v Barnard did not oblige the Australian Courts to change their settled broader approach to defamation damages, which was held not to have been developed by faulty reasoning or have been founded on misconceptions. The New Zealand approach has been, I think, substantially the same.

The first reaction in this Court to Rookes v Barnard, and English Court of Appeal authority applying it, seems to have been to follow suit: see Truth (N.Z.) Ltd v Bowles 1966 N.Z.L.R. 303, 307 per North P. But there the contrary approach was apparently not argued. Later Sir Alfred North was to sit as a

member of the Privy Council in the Australian Consolidated Press case; and when the question was next raised in this Court, in News Media Ownership v Finlay 1970 N.Z.L.R. 1089, 1100, he expressly left it open.

It is probably a tribute to the expertise of trial Judges and the common sense of juries that the point has remained unsettled. An interesting example of the difficulties arising in the interim period was drawn to our attention in argument. In Meredity v New Zealand Broadcasting Corporation (Wellington Supreme Court; A.62/67; summing up 1 November 1967) Wild C.J. was faced with a submission by Mr. Dunn for the plaintiffs that it was a case for exemplary damages to punish the corporation. The Chief Justice left this to the jury, while suggesting to

them that they would probably think that it was not a case for either punitive damages or contemptuous damages, but for a fair and reasonable award to compensate the plaintiffs for the injury to their reputation. The jury took a different view and returned at first with an award of sums of \$2000 each to the two plaintiffs and \$2500 as punitive damages. The position had to be further explained, and after retiring again they allocated the additional sum equally between the plaintiffs. The case was not taken further.

The legal history and the competing policy considerations are extensively surveyed in the powerful judgments of the House of Lords, the English Court of Appeal and the Privy Council in the leading cases already cited. One can have little or nothing to add to the

debate except a choice. The approach previously outlined, derived largely from earlier English authority, seems to have worked reasonably well in this country. Levels of damages awarded by juries in defamation cases have not been such as to call for legislation, whether judicial or parliamentary. The award in the present case, although perhaps high for the type of case, is not disturbing. I am not at all surprised by the jury's verdict and think that it would be unfortunate if exemplary damages were not available for a case such as this.

Another factor telling against departing from the old New Zealand approach is that, if Lord Devlin's categories are treated as restrictive of libel awards, to define the restriction accurately is not easy. The relevant passage in his speech is in 1964 A.C. at

Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. I have quoted the dictum of Erle C.J. in Bell v Midland Railway Co. 10 C.B.N.S. 287. Maule J. in Williams v Currie 1 C.B. 841, 848, suggests the same thing; and so does Martin B. in an obiter dictum in Crouch v Great Northern Railway Co. (1856) 11 Ex. 742, 759. It is a factor also that is taken into account in damages for libel; one man should not be allowed to sell another man's reputation for profit. Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object - perhaps some property which he covets - which neither he could not obtain at all or not obtain except at a price greater than he wants to put down.

Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay.

Not all the members of the House in Cassell v Broome treated that passage as intended to restrict punitive damages in defamation actions: see Lord Wilberforce's speech at 1119. Those of their Lordships who did so treat it took the view that the mere fact that a libel is in a newspaper or book published for profit would not be enough to justify exemplary damages. This must be so, it would seem, no matter how the law is settled. On the other hand they also indicated that the plaintiff does not have to prove anything in the nature of a mathematical calculation by the defendant. There was approval of Lawton J.'s statement in his summing up that 'a man is liable to pay damages on a punitive basis if he wilfully and

knowingly, or recklessly peddles untruths for profit'. See for instance Lord Hailsham of St. Marylebone L.C. at 1079, Lord Reid at 1088, and Viscount Dilhorne at 1101. This seems to come very close to the old law.

Insofar as a difference remains in England, it may tend to involve rather fine distinctions, as is brought out by the account of the law given in 28 Halsbury's Laws of England, 4th ed., para.243:

. . .In demonstrating the defendant's calculation as to profit, it is not sufficient to show merely that the words were published in the ordinary course of a business run with a view to profit; the publication must be intended to make a specific profit. Thus, while publication in book form would generally be indicative of such an intention, any any rate where the libel formed an integral and substantial part of the book, publication in any ordinary daily newspaper would not of itself be sufficient to fulfil the profit requirement,

in the absence of exceptional circumstances, such as a desire to steal a march on competing newspapers in a case of great public interest, or a desire to increase circulation by making a reckless and sensational attack on a prominent person.

In the current (7th) edition of Gatley the editors doubt at p. 559 'whether the principles laid down by Lord Devlin in Rookes v Barnard . . . as variously explained in Broome v Cassell. . . will in the long run contribute to the clarification of the law of damages...'

Difficult distinctions are especially undesirable in actions tried by juries. If Lord Devlin's 'second category' is restrictive in defamation cases, any issue of fact involved in determining whether the defendant had a sufficiently specific profit motive to bring the case within that category will presumably have to be submitted to the jury on a proper direction. On the

present appeal Mr. Goddard argued in the alternative that the case was within the second category in Rookes v Barnard, and White J. gave that as an alternative reason for dismissing the motion for a new trial. But I am not quite sure that the summing up was sufficiently definite as to the profit motive test to justify upholding the verdict on that basis. It has to be noted, too, that the plaintiff's photograph may not have much affected the sales of the book.

In the result I am in favour of affirming that the law of New Zealand regarding damages for defamation remains the same as was approved for Australia by the Privy Council in Australian Consolidated Press Ltd v Uren. White J.'s summing up having been in accordance with that law, the attack on it must fail.

Two other matters should be mentioned. First, I agree with White J. that in defamation actions in New Zealand exemplary damages need not be expressly claimed, as the Rules stand. A defendant to a claim for general damages for defamation - which under New Zealand practice has to name a specific sum, in effect an upper limit - must be taken to have notice that such an element may be in issue. Particulars may of course be sought, and an adjournment and costs may be appropriate if it is shown in a particular case that the defendant has been unfairly taken by surprise at the trial; but this is not such a case.

Secondly, while regarding the summing up in this case as unassailable, I would associate myself with the observations of Somers J., which I have had the advantage of seeing in draft, to

the effect that emphasis on exemplary damages as a possible additional element in an award can be dangerous. When there are features of the defendant's conduct putting him at risk of such an award, it will often be preferable to emphasise to the jury that they can only arrive at a global sum, taking into account among all the factors punishment for the defendant, if they think his conduct does require it; and that any doubling up must be carefully avoided.

The Court being unanimous, the appeal is dismissed with \$500 costs to the respondent.

R. B. Cooke, J.

Solicitors:

Brandons, Wellington, for Appellant
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for Respondent

IN THE COURT OF APPEAL OF NEW ZEALAND

C.A. 38/80

19 March 1982

ALISTER TAYLOR

VS

MARGARET LORRAINE BEERE

JUDGMENT OF SOMERS J.

In his summing up the trial judge told the jury that the case was one in which it was at liberty to award exemplary or punitive damages. The appellant, the defendant in the action, submits that the law in New Zealand as to exemplary damages is, or ought to be, the same as that in England; that the present case does not fall within any of the classes of case there recognised as justifying such an award; and that the judge was therefore wrong to allow the jury to consider exemplary damages.

Exemplary damages, sometimes called punitive, vindictive or retributory damages, are not compensatory but are intended to punish the defendant. Their award seeks to achieve recognised objects of the criminal law - deterrence and retribution. Up until 1964 the circumstances in which such damages were appropriate could be stated with some confidence. Thus Mayne & McGregor on Damages 12th Ed., (1961), 196 -

"They can apply only where the conduct of the defendant merits punishment, which is only to be considered to be so where his conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or as it is sometimes put, where he acts in contumelious disregard of the plaintiff's rights."

The last phrase echoes Knox C.J. in Whitfeld v De Lauret & Co., Ltd. (1920) 29 C.L.R. 71, 77 - "Exemplary damages are given only in cases of conscious

wrongdoing in contumelious disregard of another's rights."

The speech of Lord Devlin in Rookes v Barnard [1964] A.C. 1129 at 1221-1231, in which the other four Law Lords concurred, as explained by the majority in Cassell & Co. Ltd. v Broome [1972] A.C. 1027, has altered all that in England. Impelled largely by a perceived incongruity in permitting apparently criminal functions to intrude into the civil law whose aim in awarding damages was said to be compensatory only, the occasions upon which exemplary damages are permissible has been limited to (1) cases of oppressive arbitrary or unconstitutional action by servants or agents of national or local government; (2) cases in which the defendant's conduct is in contumelious disregard of another's rights in order to obtain some advantage

which would outweigh any compensatory damages likely to be obtained by his victim; (3) cases where exemplary damages are permitted by statute.

The second category repeats a part of Lord Reid's exposition in Cassell v Broome [1972] A.C. 1027, 1088 D-E. It might as conveniently have been put as it was by the Lord Chancellor - "the tortious act must be done with guilty knowledge for the motive that the changes of economic advantage outweigh the chances of economic or perhaps physical penalty" (1079D). That summary, while sufficient for present purposes, does not purport to do more than indicate the general nature of the limitations - the speeches of Lord Hailsham of St. Marylebone L.C. and Lord Reid in particular in Cassell v Broome indicate, as would be expected, that the

boundaries of the first two categories cannot yet be regarded as finally drawn.

Other important features of the two cases must also be noticed. The nature and scope of both exemplary and aggravated compensatory damages have been much illuminated. Damages of the latter type afford compensation when the harm done to the plaintiff has been aggravated by the manner in which it was done and that harm extends to the injured feelings of the plaintiff so caused.

And Rookes v Barnard and Cassell v Broome both stress that if circumstances exist in which exemplary damages are appropriate the total award should only be greater than the aggregate of compensatory damages where the tribunal is satisfied that the compensatory damages including any amend for aggravation of the same are insufficient to achieve

proper punishment.

What has to be determined in this case is the present standing in New Zealand of the law relating to exemplary damages. I shall endeavour to express my views on that as shortly as possible.

(1) The concept of exemplary damages in tort was a part of common law and has always been part of the law of New Zealand. It has been recognized in innumerable cases in New Zealand in both the Supreme Court and the Court of Appeal. There is no profit in attempting to list such cases but reference may be made to Matheson v Schneideman [1930] N.Z.L.R. 151 before a Full Court of the Supreme Court. It is now too late to hold that exemplary damages have no place in the assessment of damages in tort in New Zealand. Such a step would require legislation.

(2) But it is implicit in the decision of the Privy Council in Australian Consolidated Press Ltd. v Uren [1967] 117 C.L.R. 221 that it is open to this Court to determine whether for the future the occasions upon which exemplary damages may be awarded in New Zealand should be limited in the way suggested in Rookes v Barnard or in some other manner, or whether the law as it was understood and applied before that case should remain unchanged. That question has been mentioned in this court in Truth (N.Z.) Ltd. v Bowles (1966) N.Z.L.R. 303, News Media Ownership v Finlay (1970) N.Z.L.R. 1089, and in Huljich v Hill (1973) 2 N.Z.L.R. 279. But in none of those cases was a decision made or necessary. It has been referred to in the Supreme Court - see Greville v Wiseman (1967) N.Z.L.R. 795,

Fogg v Knight (1968) N.Z.L.R. 330, and A. v B. (1974) N.Z.L.R. 678. What has been said in the two English cases has had its effect in at least one summing up. In Montecino v Wellington Newspapers Ltd. (unreported 26 February 1980; Wellington A. 225/79) the jury was told that exemplary damages might only be awarded if it considered the case required the defendant to be punished and if compensatory and aggravated compensatory damages were insufficient to achieve that object.

(3) Whether, and if so to what extent, the occasions which justify an award of exemplary damages should be more narrowly confined than was the case before Rookes v Barnard (1964) A.C. 1129 involves a number of considerations. The most important are the objects

sought to be achieved by the award of damages in tort both generally and in the particular case of defamation; whether exemplary damages contribute to the attainment of those purposes; how far past experience points to the desirability of a change; the nature, scope, and effect of any proposed change; the actual or desirable effect upon the law as it was of two by-products - in truth both part of the cause and the effect - of the decisions in Rookes v Barnard and Cassell v Broome, viz., the exegesis of exemplary and aggravated compensatory damages and the emphatic affirmation that an award of compensatory damages is itself punitive; and the comprehensive nature of an award of damages as a lump sum also referred to in those two cases.

Not all of those considerations are presently susceptible of any true appre-

ciation. In his Principles of the Law of Damages published two years before the decision in Rookes v Barnard Professor Street observed at p.36 that it was not possible to say whether exemplary damages are desirable and remarked on the absence of research into the contribution of such damages to the attainment of the varied purposes of damages examined by him. The position today is not materially different.

The reasons given in Rookes v Barnard and by the majority in Cassell v Broome for limiting the circumstances in which exemplary damages may be awarded are linked - the purpose of damages is compensatory; the intrusion of concepts suitable to the criminal law is illogical, anomalous, and may give rise to injustice: see particularly the speeches of Lord Devlin in Rookes v

Barnard [1964] A.C. 1129 at pp. 1221, 1227; and of Lord Reid in Cassell v Broome [1972] A.C. 1027 at pp. 1085-1087.

Neither of those premises, to the extent they are severable, has gone unchallenged. As to the first - that damages in tort are compensatory - see Lord Wilberforce in Cassell v Broome at 1114 and Windeyer J. in Uren v John Fairfax & Sons Pty Ltd. (1966) 117 C.L.R. 119, 150-151. Those passages are also relevant to the second - the anomaly - as are also the remarks of Taylor J. in Uren at 131-130. In short it is that underlying the assertion of anomaly is a conclusion, that damages are or ought to be compensatory only, which is not warranted historically and either cannot be, or at any rate has not yet been, tested as to its social desir-

ability. No useful purpose would be served by further elaboration - the speeches in Rookes v Barnard and Cassell v Broome and the judgments in Uren really say it all.

Nor is it necessary to refer in any detail to the way in which the permitted categories are framed in the English cases. What is said in Cassell v Broome answers some of the criticisms of Rookes v Barnard which are expressed in Uren. But there are others, recognised by Lord Reid particularly in Cassell v Broome which can only be met by asserting the illogicality of extending an anomaly (see e.g. Cassell v Broome at 1088).

Past experience in New Zealand does not suggest the need for any restriction in our law of the nature mentioned in Rookes v Barnard. Nor am I persuaded by such material as is presently available

that punitive elements may not properly form a part in the assessment of damages or that considerations of social policy render their exclusion desirable.

(4) But that is not to say that our law remains unaffected by what has been said in those two landmark cases. In three aspects which tend to merge successively into each other they result in an important shift in emphasis.

The first flows from the light shed upon the extent of aggravated compensatory damages. It is clear that aggravated damages are given to compensate the plaintiff when the injury or harm done to him by the wrongful act of the defendant is aggravated by the manner in which he did the act. They may include sums for "loss of reputation injured

feelings, for outraged morality, and to enable a plaintiff to protect himself against future calumny or outrage of a similar kind" and "indignation. . . at the injury inflicted on the plaintiff is a perfectly legitimate motive in making a generous rather than a more moderate award to provide an adequate solatium" - Lord Hailsham in Cassell v Broome at 1077 B and 1073 D. This is more strictly to confine exemplary damages to their proper place, not as an expression of vindictiveness, but as a punishment and a deterrent, to show that tortious conduct does not pay.

This distinction, which in my view forms part of the law in New Zealand, had not before the two English cases been so perceived and articulated. It indicates that many cases which had hitherto been regarded as suitable for

the award of exemplary damages are really cases of aggravated compensatory damages. The demarcation itself operates to limit the occasions when exemplary damages are appropriate.

The second point, which flows from the first, is the insistence that in a case in which exemplary damages are to be considered they should be awarded "if, and only if" the sum of compensatory and aggravated compensatory damages is not of itself sufficient to inflict a proper punishment on the defendant. That too in my view represents the law now in New Zealand. And it leads directly to the third matter - the award of damages is the award of a single sum - one which in the words of Dixon J. in Smith's Newspapers Ltd. v Becker (1932) 47 C.L.R. 279, 300 "is enough to serve at once as a

solatium, vindication and compensation to him and a requital to the wrongdoer."

In the normal case of a trial by jury it is in this area that the real risk of an injustice arises. While the boundary between aggravated compensatory damages and exemplary damages may be carefully stated and well understood by lawyers the factors which go to aggravate can in the mind of the jury tend to merge into those which merit punishment. If that happens there will be a doubling up. There are two ways of meeting this. The first is to give an exposition of aggravated damages and the "if but only if" warning of Lord Devlin in Rookes v Barnard [1964] A.C. at 1228. While that phrase is valuable in capturing the nature of and circumstances in which exemplary damages may be awarded it is in my view not the most

appropriate way to put the matter to a jury. Apart from the fact that it tends to produce an award which is an aggregate of isolated considerations it is likely as I think to produce just that result which it is aimed to prevent. To direct a jury to award a sum which brings to account all the various factors is much more likely to avoid duplication as well as according with the conceptual nature of an award of damages. (On all this the speech of Lord Wilberforce in Cassell v Broome at 116 and the judgment of Windeyer J. in Uren at 150 are valuable).

I summarize my views in this way (1) Exemplary damages have a place in the law of tort in New Zealand. (2) The circumstances in which they may be awarded are those referred to in Mayne v MacGregor 12th Ed., 196 (3) The scope

of aggravated compensatory damages is as expounded in Cassell v Broome and that breadth means the occasions upon which exemplary damages are appropriate are less than had previously been thought.

(4) Juries should be directed to return a single award taking account where exemplary damages are appropriate that any sum awarded is to the defendant a penalty.

It is now possible to return to the instant case. It is not necessary to decide whether it was one capable of attracting exemplary damages under the law as I would hold it to be. That was not in issue. The appellant's case was that the law of England as to the limited circumstances in which exemplary damages may be awarded should be followed; it was not his case that the judge was wrong to leave the issue of

exemplary damages to the jury if that were not so or in that event that the summing up on the issue was in any way erroneous.

I would dismiss the appeal.

Sommers, J.

IN THE COURT OF APPEAL OF NEW ZEALAND

C.A. 38/80

19 March 1982

ALISTER TAYLOR

VS

MARGARET LORRAINE BEERE

JUDGMENT OF RICHARDSON J.

The primary issue on this appeal arises from the directions given by the trial judge on the question of exemplary damages. The underlying questions are: (1) whether exemplary damages should hereafter be awarded in New Zealand courts; and, if so, (2) whether the categories of cases in which they may be awarded should be defined and limited either in terms of the restrictions laid down by the House of Lords in Rookes v Barnard [1964] AC 1129 and Cassell v

Broome [1972] AC 1027, or in some other manner. These questions could be debated at very great length. However, in the view I take it is not necessary to develop an elaborate argument. A number of points may be mentioned quite briefly before turning to consider, again quite briefly, the two critical questions to which I have referred.

1. It is well settled that exemplary damages and ordinary damages (including aggravated damages) serve essentially different purposes. That point is given some emphasis in Rookes v Barnard where the House of Lords narrowed the classes of cases in which exemplary damages could be awarded in England. In the language of Lord Devlin (p 1121): "Exemplary damages are essentially different from ordinary damages. The object of damages in the

usual sense of the term is to compensate. The object of exemplary damages is to punish and deter." In Huljich v Hall [1973] 2 NZLR 279, 287, in this court, McCarthy J expressed the same distinction in this way:

"Aggravated damages are extra compensation to a plaintiff for injury to his feelings and dignity caused by the manner in which the defendant acted. Exemplary damages, on the other hand, are damages which, in certain instances only, are allowed to punish a defendant for his conduct in inflicting the harm complained of."

2. Before Rookes v Barnard, the distinction between aggravated compensatory damages and exemplary damages had not always been drawn in the reported cases. This for the reason that on the wider approach to the award of exemplary damages which had prevailed up to that time ordinarily it made no difference whether the damages under review were

characterized as aggravated damages or exemplary damages. Earlier cases need to be read bearing in mind that the courts were not necessarily concerned to identify that distinction.

It is equally clear, and this was emphasised by Lord Devlin, that even on the larger definition of aggravated damages in Rookes v Barnard there had been many awards of damages which could not be explained or regarded as compensatory. After tracing the history of the recognition of purely exemplary damages from the great cases of the 1760s down to the 1960 copyright case of Williams v Settle [1960] 1 WLR 1072, he concluded that precedent and statute alike demanded recognition of the exemplary principle as he had defined it.

3. Prior to Rookes v Barnard it had

not been perceived - either in England (Rookes v Barnard at p 1226), or in Australia (Uren v John Fairfax & Sons Limited [1966] 117 CLR 118, 145), or in Canada (see Fridman, Punitive Damages in Tort [1970] 48 Can BR 373) - that the award of exemplary damages was confined to define categories of torts. Indeed Lord Devlin noted at p. 1226 that his proposal would "impose limits not hitherto expressed on such awards."

4. There is no such restriction on the availability of exemplary damages discernible in the pre- Rookes v Barnard cases in this country. New Zealand courts have recognized that exemplary damages in the extracompensatory sense may be awarded in any proper case.

Over a century ago Chapman J observed in McComb v Low (1873) 1 NZ Jur 49, 54 that cases of personal torts may

have an element of public scandal or public outrage which the law permits to be met by exemplary or punitive or vindictive damages. He went on to say that while there may be some anomaly in the rule as it clearly looks beyond the parties to the action but allows that part of the damages to find its way along with the compensatory portion into the pocket of the plaintiff, nevertheless, "it is well recognised law, and the jury in such cases is always permitted, and is sometimes encouraged and enjoined, to give extra damages of a vindictive, exemplary, or punitive nature."

It is apparent from the few reported cases in this country that that jurisdiction has continued to be recognised. One such early case is Stapleton v Smith (1888) 6 NZLR 663 where, in

refusing a motion for new trial of an action for malicious prosecution on the ground that the damages were excessive, the Full Court per Richmond J noted (p 665): "The damages are no doubt vindictive, but that in itself is no ground for interference." In Butler v Black [1920] NZLR 17 McComb v Low was described as the classic authority on the question of damages. Then in Wah Jang & Co. Limited v West [1933] NZLR 235 Smith J said, at p 237: "The Court may also in a proper case award punitive damages in order to inflict a penalty upon the defendant and teach him a lesson. . . ." See, too, Norton v Stringer (1909) 29 NZLR 249 at 256; and Matheson v Schneideman [1930] NZLR 151 at 160. This court has not been called on to consider the scope of exemplary damages under New Zealand law following

the decisions of the House of Lords in Rookes v Barnard and Cassell v Broome and the Judicial Committee in Australian Consolidated Press Limited v Uren [1969] 1 AC 590. Nevertheless, it seems that, notwithstanding Cassell v Broome, New Zealand trial judges have continued to adopt the wider approach which is also reflected in the decisions of the Australian and Canadian courts.

5. While, for obvious reasons, we always give great weight to decisions of the House of Lords, this is an area of social policy and legal philosophy where in the end it is for the New Zealand courts to decide what the policy of the law of New Zealand should be. In Australian Consolidated Press Limited v Uren Lord Morris of Borth-y-Gest, in delivering the judgment of a Board which included North P of this Court, set out

the relevant considerations in the following passage at p 641:

"There are doubtless advantages if within those parts of the Commonwealth (or indeed of the English-speaking world) where the law is built upon a common foundation development proceeds along similar lines. But development may gain its impetus from any one and not from one only of those parts. The law may be influenced from any one direction. The gain that uniformity of approach may yield is however far less marked in some branches of the law than in others. . . . But in matters which may considerably be of domestic or internal significance the need for uniformity is not compelling. Furthermore a decision on such a question as to whether there may be a punitive element in an assessment of damages for libel must be much affected by the fact, if fact it be, that in a particular country the law is well settled."

In the result the Judicial Committee was not prepared to say that the High Court of Australia was wrong in being unconvinced that a changed approach in Australia was desirable.

The future of exemplary damages under
New Zealand law

Against that background I turn to consider the policy question: should this court now rule that exemplary damages cannot hereafter be awarded in the courts of New Zealand. I unhesitatingly answer it in the negative.

In my view the proper forum for the determination of that issue is Parliament. In the light of our legal history and common law heritage we would exceed our function if we were to declare that, notwithstanding the long recognition of the exemplary principle in this country and other common law jurisdictions, exemplary damages would by our judicial fiat no longer be recoverable under New Zealand law. If exemplary damages are to be abolished, the proper route to achieve that end is by legislation.

In any event I am not persuaded that such a change would necessarily be in the public interest. There are arguments both ways. They may be summarised quite shortly. As the various terms "punitive damages", "exemplary damages" and "retributory damages" indicate, an award in this category is intended to punish outrageous conduct; to make an example of the person responsible thereby demonstrating society's disapproval of his behaviour and deterring others in the future; to exact retribution and to make the defendant smart for his conduct; or, as Lord Devlin put it in Rookes v Barnard (p 1227), "to teach a wrongdoer that tort does not pay." Against that it is said: that the award of damages should be confined to compensating the plaintiff for the loss he has suffered; that a plaintiff re-

ceiving exemplary damages is unjustly enriched by an award imposed on the defendant for reasons of public policy; that, if the defendant's conduct is considered worthy of punishment, it should be dealt with by the criminal law and under the protection of the criminal law; and that the defendant should not be in double jeopardy and face punishment in civil proceedings as well as under the criminal law.

There are two considerations which particularly weigh with me. The first concerns the principles at stake. Much of the opposition to exemplary damages is based on the premise that there is or ought to be a clear demarcation line between the legitimate concerns of the law of torts and those of the criminal law and, so the argument runs, punishment is the exclusive concern of the

criminal law. The soundness of the premise is itself a matter of dispute. As Windeyer J observed in Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118, 149, the roots of tort and crime in the law of England are greatly intermingled. Even today tort law cannot be fitted neatly into a single compartment. In part this is because it serves various social purposes. It is not simply a compensation device or a loss distribution mechanism. It is a hybrid of private law and public interest issues and concerns. So a tort suit cannot be regarded as the exclusive preserve of the parties. At the same time the nature and impact of public interest considerations must depend on contemporary perceptions of the role of the justice system in our society. And in Cassell v Broome Lord Wilberforce

said at p 1114:

"It cannot lightly be taken for granted, even as a matter of theory, that the purpose of the law of tort is compensation, still less than it ought to be, an issue of large social import, or that there is something inappropriate or illogical or anomalous (a question-begging word) in including a punitive element in civil damages, or, conversely, that the criminal law, rather than the civil law, is in these cases the better instrument for conveying social disapproval, or for redressing a wrong to the social fabric, or that damages in any case can be broken down into the two separate elements. As a matter of practice English law has not committed itself to any of these theories: it may have been wiser than it knew."

Nor in policy terms is there legislative support for the rigid separation of the enforcement processes in crime and tort. On the contrary, there are various statutes which authorize the criminal courts to compensate in various ways the victim of the offending. See,

for example, Criminal Justice Act 1954 ss 8(1)(b), 41(2), 42(5) and 45A; Crimes Act 1961 ss 228, 403 and 404; Children and Young Persons Act 1974 s 36(1)(e) and (f); Police Offences Act 1927 s 6(2). Again, there are many torts which are not also crimes and in respect of which the exemplary principle may be applied under our existing law. In other areas, such as defamation, criminal laws do not provide a practical alternative punishment for outrageous conduct.

It is also arguable that we have already come to place too much reliance on the initiatives of instrumentalitis of the State and so to expect too much of the criminal law as a vehicle of social control of an increasingly diverse and multivalue society; and that in the long run the overuse of criminal

sanctions is likely to diminish respect for the criminal law contrary to the public interest. However, it is not necessary to pursue this line of argument further. It is sufficient to note that it adds to the doubt as to whether the concepts of compensation and punishment can sensibly be contained in watertight compartments.

Having regard to those considerations I am not satisfied that it is inappropriate in our society for a jury or a judge to register condemnation of outrageous conduct on the part of a defendant in tort proceedings beyond what is properly allowed for in the award of compensatory damages (including aggravated damages for the harm and insult to the plaintiff). The exemplary principle is that there will be cases where it is appropriate to mark in this

way the contumelious disregard by the defendant of the plaintiff's rights. The exemplary element is the difference between what the plaintiff ought to receive as compensation for the wrong suffered and what the defendant ought to pay. The plaintiff who gains an extra-compensatory sum has been the victim of the conduct of the defendant which requires censure. So as Lord Diplock colourfully put it in Cassell v Broome (p 1126), "He can only profit from the windfall if the wind was blowing his way."

Finally, and unlike the position in England (see Lord Wilberforce in Cassell v Broome at p 1114-1115) it cannot be said that New Zealand law contains a heavy punitive element in its costs system. The party/party scale of costs falls far short of a complete indemnity

to the plaintiff. As this case shows - the total amount awarded the respondent plaintiff for costs, disbursements and witnesses' expenses following a two day jury trial was only \$2603. In the result meritorious plaintiffs are disadvantaged and their defendants advantaged under our system.

The second and pragmatic consideration is that the utility of the exemplary principle is reflected in the number and variety of claims for exemplary damages made in common law jurisdictions. They amply demonstrate the felt need for this kind of civil remedy. In 1851, speaking for the Supreme Court of the United States in Day v Woodworth 13 How 363, 371, Grier J said:

"It is a well-established principle of the common law, that in actions of trespass and all actions on the case for

torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument."

Since then there have been literally hundreds of reported cases on exemplary damages, particularly in America and Canada, and there has been a continuing flow of academic writing on the subject. There are few reported New Zealand decisions in recent years, but we were referred in argument to eight other cases in the High Court, all decided within the last three or four years, and I have the impression that the consideration of exemplary damages has not occasioned particular dif-

ficulties. It is fair to say that in seeking the remedy and securing awards of exemplary damages our people continue to demonstraethe vitality of a jurisdiction in the courts to mark heinous conduct in the course of tortious activity.

Restricting exemplary damages to defined categories of tortious conduct.

The second question for consideration is whether the classes of tort claims in which exemplary damages may be awarded should be defined and confined either in terms of the limitations laid down in Rookes v Barnard or in some other manner.

There are, I think two main reasons why Rookes v Barnard has received a generally negative reception outside the United Kingdom. The first is one of

principle. The second is the practical problem of determining and defining classes of tortious conduct to which exemplary damages should be confined.

As Windeyer J said in Uren's case (p 149), it is general conceptions that count in the development of the common law, and to confine exemplary damages to the particular instances which Lord Devlin illustratively described is to restrict the general principle that exemplary damages may be given to make it clear that tort does not pay. In Paragon Properties Ltd v Magna Envestments Ltd (1972) 24 DLR 156 at 167 Clement JA put the same point in sharper focus in a passage which has been cited with approval in a number of subsequent Canadian decisions. Referring to Rookes v Barnard he said:

"The case recognizes the principle of exemplary damages, but

in restricting its application it, in my opinion, does injustice to the principle. The basis of such an award is actionable injury to the plaintiff done in such a manner that it offends the ordinary standards of morality or decent conduct in the community in such marked degree that censure by way of damages is, in the opinion of the Court, warranted. The object is variously described to include deterrence to other possible wrongdoers, or punishment for maliciousness, or supracompensatory recognition of unnecessary humiliation or other harm to which the claimant has been subjected by the censurable act. It is reprehensible conduct of the wrongdoer which attracts the principle, not the legal category of the wrong out of which compensatory damages arise and in relation to which the conduct occurred. To place arbitrary limitations upon its application is to evade the underlying principle and replace it with an uncertain and debatable jurisdiction."

Lord Devlin confined the award of exemplary damages in England to three classes of cases: where there has been "oppressive, arbitrary or unconsti-

tutional action by the servants of the government"; where "the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff"; and where exemplary damages are allowed for by statute.

Nothing needs to be said as to the third category. The first admits the generality of the exemplary principle but confines its operation to a particular class of defendants. The second confines the principle to a particular category but admits it against all defendants. The logic behind that dual disparate approach is not immediately apparent. I feel that in the New Zealand setting arbitrary limitations of the kinds formulated by Lord Devlin would be wrong in principle and unsatisfactory in practice.

Consider the first category. Why should servants of the government be singled out? Other individuals are capable of oppressive behaviour and they may be invested with and misuse the authority of a company or other organisation just as much as a public servant. If the focus is to shift to the employer of the defendant where is the line to be drawn? Are wholly (or substantially?) publicly owned (or financed?) trading corporations and local bodies and quangos of various kinds included? The problems in drawing a line at a particular point are obvious enough. The justification for doing so does not seem to me compelling. In my view the technicalities of employment status are an unsatisfactory basis in our society for determining whether heinous conduct on the part of a

defendant should govern liability to pay exemplary damages.

Take next the second category. Why should we single out the profit motive? Is oppressive, calculated conduct any more opprobrious or otherwise inherently worse if motivated by financial greed rather than, say, by spite, malice or a lust for power over others? It was in this context that Salmon LJ observed in Cassell v Broome [1971] 2 WB 354, 388, that assault and trespass are rarely committed for a profit motive and that the same applies to many wicked libels.

It is the quality of the conduct which should count. "The oppressor's wrong, the proud man's contumely. . .the insolence of office" are all proper subjects of censure today as they were four hundred years ago. If the

exemplary principle is to continue, the availability of the remedy of exemplary damages should not hinge on the occupation of the defendant or on any fine analysis of his motivation. It follows in my view that any other categorisation which attempts to limit the generality of the application of the exemplary principle is likely to be susceptible to similar criticisms.

A final comment on the criticism which is sometimes expressed that the exemplary principle leads to exorbitant awards of damages. I cannot accept the thesis that juries or judges sitting alone cannot be trusted with the fixing of exemplary damages across the board. The power of the tribunal of fact to award exemplary damages in appropriate circumstances is subject to review in the ordinary way. There is nothing in

the New Zealand experience which persuades me that the customary checks on awards of damages are inadequate and that there is any justification for the courts to set about restricting the classes of case in which exemplary damages may hereafter be awarded in this country.

Richardson J.

THE QUESTION OF AWARDING PUNITIVE
DAMAGES AGAINST THE MANUFACTURER
OF A DEFECTIVE AIRCRAFT CAUSING
PERSONAL INJURY OR DEATH IN NEW
ZEALAND IN THE AREA OF THE
ACCIDENT COMPENSATION ACT 1972:

Can an action for "exemplary" or "punitive"¹* damages be brought against the manufacturer of a defective aircraft causing personal injury or death in New Zealand, notwithstanding the Accident Compensation Act, 1972?² It appears, that in light of the recent New Zealand Court of Appeal decision in Donselaar v. Donselaar³ the answer is to be in the affirmative. Although such damages were never pleaded in the case of Bennett v. Enstrom Helicopter Corp.⁴ before the United States Court of Appeal for the Sixth Circuit, it is submitted, that on the basis of the Donselaar decision, there is a cause of action for punitive

*Footnotes are at end of article.

damages against the manufacturer of the aircraft since the ACA does not bar such an action when compensation for personal injury or death has already been awarded under the Act.

This article examines the issue of awarding punitive damages against a manufacturer of defective products causing personal injury or death under New Zealand law since the coming into force of the ACA.

Thus, by way of introduction, the nature and purpose of punitive damages are considered noting recent instances of recovery of this head of damage against United States aircraft manufacturers. This is followed by an examination of the circumstances in which such damages were awarded by New Zealand courts prior to the coming into force of the ACA in 1974. Against this

background, the relevant provisions of the ACA are considered along with a survey of the way the courts and academic commentators have viewed the question of whether the Act is a statutory bar to the common law right of punitive damages. This is then followed by a consideration of the changes that have come about in bringing such an action due to the ACA. In the final analysis, application of the principles discussed are made to the case of Bennett v. Enstrom Helicopter Corp.

1. THE NATURE AND PURPOSE OF PUNITIVE DAMAGES:

Although the doctrine of punitive damages is centuries old,⁵ its application as a recoverable head of damage in the area of products liability, or more specifically aircraft manufacturers'

liability, is relatively recent. Punitive damages can be defined as damages awarded to a plaintiff in excess of any award of compensatory damages, the purpose of which is to punish the defendant and at the same time act as a deterrent to others who may indulge in such conduct. These damages are usually only awarded when the defendant's wrongful act was done maliciously, wilfully or wantonly with a certain disregard for the consequences.

Although an award for punitive damages was made as early as 1852 by a Kentucky court in a products liability case,⁶ and then in the case of Standard Oil v. Gunn⁷ in which the Alabama Supreme Court upheld a jury verdict for punitive damages in the case of a defective product, it was during the 1960's that this head of damage was to be

increasingly awarded in products liability cases. The case which marked the noticeable increase in such awards was Toole v. Richardson-Merrell, Inc.⁸ which was an action against the manufacturer of the drug "MER/29". The defendant drug company, having knowledge of certain side effects of the drug, had deliberately withheld such information from the Food and Drug Administration and had misrepresented the drug when advertising it to the consumer and medical groups. As a result of its use, there were hundreds of cases reporting cataracts as a side effect. The jury, as a result of the defendant's knowledge of these effects, awarded \$500,000.00 in punitive damages. This amount was later reduced to \$250,000.00. However, in the case of Roginsky v. Richardson-Merrell, Inc.⁹ arising out of the same fact

situation as the Toole case, in which New York law was applied in the Federal Court, the trial courts punitive damage award of \$100,000.00 was overturned. Judge Friendly, basing his decision on policy grounds, made reference to the potential lawsuits that would result if the defendant were punished, to the point of his economic life being threatened. He felt this was not necessary.¹⁰

The general rule throughout all of these cases was that punitive damages did not arise automatically from the commission of a tort "but rather they arose from one of the aggravating factors extraneous to the tort".¹¹

The most significant of these cases, being significant in terms of the amount of the award, was the Pinto car case of Grimshaw v. Ford Motor Corp.¹² when a

Californian jury awarded \$125 million in punitive damages. This amount was later reduced by the court to \$3.5 million which was then affirmed by the California Court of Appeal.

As the area of products liability has opened up to awards of punitive damages for defective products, the aircraft manufacturer has featured as a defendant in cases involving large awards. Notable among these is the case of Pease v. Beech Aircraft Corp.¹³ in which a Californian jury awarded \$20,000,000 in punitive damages. In an earlier case, a jury awarded over \$10,000,000 in punitive damages against another aircraft manufacturer.¹⁴ With this movement in the United States in the last decade towards the aircraft manufacturer becoming a more familiar defendant in products liability litiga-

tion with punitive damage awards, the question of punitive damages under New Zealand law is now considered.

2. THE LAW OF PUNITIVE DAMAGES IN NEW ZEALAND:

Any account of the recovery of punitive damages in New Zealand must be prefaced by the fact that in many cases where such awards have been made, the cases have not been reported. This issue was raised by M.A. Vennell, who pointed out that since most of these awards are determined by a jury, unless they are excessive, there will be no application for a new trial, and the case is unlikely to be reported.¹⁵

The first reported New Zealand case in which there was an award of punitive damages dates back to 1873. This was the case of McComb v. Low¹⁶ in which

Chapman, J. stated that in cases of "personal torts" there may be an element of public scandal or outrage which the law permits to be met by exemplary, punitive or vindictive damages. In the next reported case of Stapleton v. Smith¹⁷ the Supreme Court did not interfere with damages that were "vindictive".¹⁸ The New Zealand Court of Appeal in the case of Norton v. Stringer¹⁹ approved a paragraph in Odgers on Libel 9th Ed., 350 referred to by Denniston, J. in the Supreme Court where it was stated that "vindictive or retributory or exemplary damages are awarded where the jury desire to make their sense of the defendant's conduct, by fining him to a certain extent. They therefore punish the defendant by awarding the plaintiff damages in excess of the amount which would be adequate com-

compensation for the injury inflicted on his reputation." The case that was before the court in that instance, involved libel. The next case to go before the Supreme Court on the question of punitive damages was that of Butler v. Black.²⁰ Stout, C.J., delivering the judgment of the court approved the earlier decision of McComb v. Low, which he described as being the classic authority on the question of damages. In the case of Matheson v. Schneideman,²¹ which was an action for slander, Myers, C.J. delivering the judgment of himself and Blair, J. noted that although the particular case of slander was not one in which it was appropriate to award punitive damages, a jury would be "entitled to award exemplary or punitive damages in a proper case."²² The last of these earlier cases on punitive damages was

Wah Jang & Co. v. West²³ which also involved slander. Smith, J. in having regard to all the circumstances in awarding damages, noted a need for a punitive element to be included in the award.²⁴ Although these early reported cases are few in number, they do establish that New Zealand courts had recognised the availability of punitive damages dating back to 1873.

Of the more recent cases, however, the discussion must begin with the Supreme Court decision of Furniss v. Fitchett.²⁵ Heard before the Chief Justice, Sir Harold Barrowclough and a jury, this was an action in negligence for disclosure of information on the part of a medical practitioner. The Chief Justice's direction to the jury was that if there was evidence of bad faith or malicious motive, "exemplary or

punitive damages would have been available." Mention was also made by the court of the fact that the reason why this action was being brought in tort rather than contract was that exemplary damages were available in tort only. Clearly the case is authority for the following:

- 1) Exemplary or punitive damages are available in an action for negligence.
- 2) In order to recover such damages, not only must negligence be proved, but also some other factors that aggravated the damage such as bad faith, malicious motive or acting treacherously and shamefully.
- 3) The award of punitive damages was not dependent on an award of compensatory damages, since there was no other head of damage pleaded in this case, the L250 plus costs awarded by the court appears to have been for punitive damages alone.

After this decision, it was some time before there was another reported case

on the awarding of punitive damages in New Zealand. The question did however come before the House of Lords and then the High Court of Australia and ultimately the Privy Council. In 1964 in an intimidation action before the House of Lords, the question of punitive damages arose in the case of Rookes v.

Barnard²⁶. Lord Devlin, after documenting the history²⁷ of punitive damages in English law and noting that the object of such damages was to punish and deter,²⁸ restricted the availability of such damages to two narrow categories. These include:²⁹

(1) Cases of oppressive, arbitrary or unconstitutional action by the servants of the government.

and

(2) Cases where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable

to the plaintiff.

Added to these two "common law" categories was any category in which "exemplary damages are expressly authorised by Statute."³⁰ Lord Devlin then specified that recovery of such damages was only available if the plaintiff was the victim of the punishable behavior and that such damages were to be awarded with restraint. He also added that the "means of the parties" was material in the assessment of such damages.³¹ Lord Devlin then went on to overrule the case of London v. Ryder³² in which punitive damages had been awarded in cases of assault and trespass. The reason for holding that punitive damages could not be awarded in such cases was because assaults and malicious injuries to property can generally be punished as crimes.

Three years after the House of Lords decision in Rookes v. Barnard the question of the categories in which punitive damages would be allowed, came before the High Court of Australia in the two contemporaneously decided cases of Uren v. John Fairfax & Sons Pty. Ltd.³³ and Australian Consolidated Press Ltd. v. Uren.³⁴ Both these actions were in defamation and were against two separate newspapers. The views expressed by the five judges in the John Fairfax case were confirmed in the Australian Consolidated Press case. Therefore considering the John Fairfax case, it was decided that as far as the House of Lords decision in Rookes v. Barnard was concerned the High Court of Australia did not see itself bound.³⁵ He stated:

" . . . I think that we should not in this case decide that an award of exemplary damages is not appropriate merely because

the case cannot be brought within Lord Devlin's second category. . . I am not prepared to follow the House of Lords because I think the code of law on exemplary damages, which their Lordships have laid down for the U.K. should not by a judgment of this court in this case be made law in Australia."³⁶

Mr. Justice Taylor, after considering authorities in the United States and England and noting that the High Court of Australia recognised wider categories for the awarding of punitive damages than those in Rookes v. Barnard, made the following statement:

" . . . I am firmly of the opinion that the observations in Rookes v. Barnard do not express the law of this country and that they should not be followed."³⁷

With this rejection of the Rookes v. Barnard categories by all five judges of the High Court, Mr. Justice Windeyer adopted the following as the appropriate test, which appeared in the first edit-

ion of Salmond on Torts:³⁸

"In order that exemplary damages are awarded there must be evidence on which the jury could find that there was, at least, a conscious wrongdoing in contumelious disregard of another's rights."³⁹

He noted that this phrase had been used by the court before. In sum, the High Court of Australia laid down the rule that in a tortious action, including defamation, punitive damages may be awarded if it appears that the defendant's conduct in committing the wrong exhibited a contumelious disregard of the plaintiff's rights. As mentioned, this same principle was upheld in the contemporaneous decision of the same court in Australian Consolidated Press Ltd. v. Uren,⁴⁰ where the same judges referred to their judgments in the Fairfax case. The High Court's decision in Australian Consolidated Press then went

before the Judicial Committee of the Privy Council.⁴¹ The question for determination before the Judicial Committee was whether or not the law as had been settled in Australia before Rookes v. Barnard, should be changed. Lord Morris of Borth-y-Gest, delivering the opinion of the Judicial Committee, felt that since the law relating to punitive damages in Australia had not developed by a process of faulty reasoning and was not founded on misconceptions, there was no reason to restrict the awarding of such damages to the categories of Rookes v. Barnard.

The New Zealand position was not as clear. The issue of punitive damages came before the Supreme Court in the case of Fogg v. McKnight⁴² which was an action for assault. The actual harm for which damages were being claimed con-

sisted of insult, indignity, mental suffering, disgrace and humiliation resulting from a department store detective committing a technical assault on the plaintiff who was incorrectly suspected of acting in the manner of a shoplifter. Mr. Justice McGregor saw the type of harm complained of as being compensatory in nature as opposed to punitive. He did however add that if he was wrong, in the sense that it was punitive, then the categories of Rookes v. Barnard would not apply in New Zealand. He stated:

"Even if I am wrong in considering that damages for injury to feelings are compensatory, it seems to me that in view of the decision of the Privy Council in Australian Consolidated Press Ltd. v Uren the New Zealand courts are not bound by Lord Devlin's decision. In the Australian case it has been held that where policy in a particular country has been fashioned by judicial opinion, it becomes a question

for the court of such country to decide whether the decision in Rookes v. Barnard compels a change in what has been well settled by judicial approach in the law of the particular country."⁴³

He then notes that the policy of judicial decision in New Zealand seemed to recognise that punitive damages could be recovered in an assault action as had been the situation in England prior to the House of Lord's decision in Rookes v. Barnard. Although what was stated in Fogg v. McKnight in regard to punitive damages was obiter, it was clear that given the choice between the Privy Council and House of Lord's in this matter, the New Zealand court would follow the Privy Council decision.⁴⁴

With the doctrine of punitive damages clearly an established part of New Zealand law for a century with recovery in cases of defamation, malicious pro-

secution, negligence and assault, it was clear from the decision in Fogg v. McKnight that the New Zealand courts would not be restricted by the categories of Rookes v. Barnard in the awarding of such damages. Despite these developments, there were still uncertainties in bringing a claim for such damages. While such damages were clearly recoverable for certain tortious acts, the recovery of punitive damages in other areas was unclear. Essentially the doctrine lacked a test defining the circumstances in which such damages would be recoverable and thus recovery in personal injury and death cases were affected by this uncertainty when the ACA came into force.

3. THE ACCIDENT COMPENSATION ACT 1972:

The ACA came into force on April 1,

1974, as the long title to the Act suggests, to provide a uniform system of rehabilitation and compensation for personal injury or death resulting from accident, in New Zealand. This uniform system replaced the common law right of recovery for death or personal injury based on negligence (or fault) with a statutory non-fault system. While the Act refers to accidents occurring in New Zealand, the statutory cover does, however, in certain categories extend to persons outside New Zealand.⁴⁵ Also, while the Act abolished the common law right to bring proceedings to recover compensatory damages in tort or contract, this right is only abolished where the proceedings are brought "in New Zealand".⁴⁶ Section 131(2) recognises that when there is a case of personal injury or death in New Zealand,

that a claim may lie outside New Zealand. Section 5(3)(a) specifies that nothing in Section 5, which prevents the bringing of proceedings in New Zealand for compensatory damages, shall affect any action which lies in accordance with Section 131 of the Act. The Accident Compensation Commission is given a discretion in a case where proceedings are being brought elsewhere to:

1. Deduct the amount payable under the Act, or recover from the person to whom compensation has already been paid, from any amount recovered by the enforcement of a claim under Section 131. Section 131(3)(a).

2. Require that all reasonable steps be taken to pursue the claim for damages as a condition precedent to payment of compensation under the Act (Section 131[3][b]).

also

3. The commission may meet the whole or part of the costs in pursuing such a claim.

Thus the statute, while it replaced the common law right of claiming compensatory damages in personal injury or death actions, made no changes to the common law right to bring proceedings outside New Zealand.

The provisions of the ACA relevant to the question of whether the Act takes away the common law right of claiming punitive damages in a case involving personal injury or death by accident, must be considered next. Central to this determination are the words of Section 5 ⁴⁷ which provide:

"1) Subject to the provisions of this section, where any person suffers personal injury by accident in New Zealand or dies as a result of personal injury so suffered, or where any person suffers outside New Zealand personal injury by accident in respect of which he has cover under this Act or dies as a result of personal injury so suffered, no proceedings for damages arising directly or indirectly out of

the injury or death shall be brought in any court in New Zealand independantly of this Act, whether by that person or any other person, and whether under any rule of law or any enactment.

2) Without limiting the generality of subsection (1) of this section, the action for loss of services (known as the action per quod consortium amisit) are hereby abolished.

3) Nothing in this section shall affect:

(a) any action which lies in accordance with section 131 of this Act; or

(b) any action for damages by the injured person or his administrator or any other person for a breach of a contract of insurance; or

(c) any proceedings for damages arising out of personal injury by accident or death resulting therefrom, if the accident occurred before the 1st day of April 1974.

4) No person shall have cover under this Act in respect of personal injury by accident if the accident occurred before the 1st day of April 1974.

5) Where in any proceedings

before a court a question arises as to whether any person has cover under this Act, the court shall refer the question to the Accident Compensation Commission for decision, and the Commission shall have exclusive jurisdiction to determine the question.

6) The Commission may, on the application of any person who is a party to any proceedings or contemplated proceedings before a court, determine any such question.

7) Subject of Part VII of this Act, a subsisting decision of the Commission under subsections (5) and (6) of this section shall be conclusive evidence as to whether or not the person to whom the decision relates had cover under this Act.

Whether or not the Act excludes an action for punitive damages in the case of personal injury or death by accident, depends on whether or not such damages arise "directly or indirectly out of the injury". This question has prompted much academic comment and has been the subject of varied judicial interpreta-

tion. On one side there is the view that the Act abolishes proceedings for one head of damages, those being compensatory damages, while a right of action for other heads of damage, remain in tact. On the other side there is the view that since punitive damages arise "indirectly" from the injury they are excluded by Section 5. Both the academic and judicial interpretations will be considered.

(a) Academic Comment: Most notable amongst those maintaining that Section 5 does not bar such an action, is the view expressed by M.A. Vennell.⁴⁸ She argues that the ACA merely replaces one head of damage (personal injuries), but does not remove the cause of action. Noting that one cause of action brought about by a damaging event can in fact give rise to more than one head of damage, for ex-

ample a cause of action based on assault will give rise to maybe two or three heads of damage apart from that arising out of personal injury. She states:

"It would be somewhat ironical if the victim of an assault who happened to suffer no personal injury could claim in the courts, whereas the victim of a similar assault who suffered personal injury could only claim from the Commission".⁴⁹

Summarising the interpretation advocated, she states:

"Since Section 5 of the Act only supplants the common law claim for damages flowing from personal injuries, the cause of action giving rise to a claim in damages remains intact so long as the particular kind of damages namely, that resulting from personal injury, is not included in the claim".⁵⁰

Applying this analysis to the question of punitive damages under the ACA, she comments that so long as such damages are not "parasitic" in the sense that they are dependant on the existence

of some other head of damage such as damages for personal injuries, they are recoverable.⁵¹ Her explanation of what was meant by the use of the words "directly" or "indirectly" in the context of Section 5(1) was that they referred to the rule in Fetter v. Beal.⁵² That was the rule that damages were "once and for all" in that if further damage of the same kind flows from the damaging event a second claim based on the same cause of action cannot be brought even though such damages materialised after the first claim had been heard and satisfied.⁵³

Another advocate of the position that Section 5(1) does not preclude an action for punitive damages is D. Collins.⁵⁴ His contention is that since punitive damages are awarded to punish a wrongdoer for his action and not to

compensate a victim for personal injuries,⁵⁵ they are not excluded by Section 5(1) since that section excludes proceedings for compensation for personal injuries. Closely scrutinising the words of Section 5(1), he states:

"Section 5(1) does not abolish causes of action which if pursued would possibly result in damages being awarded for personal injury caused by accident, it simply abolishes proceedings to seek such damages. Thus, if the cause of action is actionable without proof of damages, or if damages other than damages arising directly or indirectly from personal injury can be obtained, the appropriate proceedings may still be commenced without contravening the provisions of Section 5(1)."⁵⁶

As to the meaning of the words "directly" or "indirectly" used in Section 5(1) he suggests that these may include damages for medical expenses, cost of lost board and earnings or damage to clothing, however, he takes the position

that in no way can the words refer to an action for punitive damages because:

"The words "directly" or "indirectly" are hinged upon the words "injury or death" it cannot be said that they refer to proceedings for damages that are not related to physical injury. Thus, because punitive damages are not awarded in respect of the injury suffered by the victim, Section 5(1) does not necessarily bar proceedings to recover this species of damages."⁵⁷

He draws support for this contention from the words of Section 5(2) which specifically exclude certain causes of action,⁵⁸ since it is clear that punitive damages in New Zealand are awarded to punish and deter the wrongdoer and not to compensate for personal injuries, and Section 5 deals with compensation for personal injuries, the conclusion that can be drawn is that:

"Section 5(1) does not prohibit a claim for punitive damages in respect of an action which may be regarded as an "accident"

causing "personal injury" for the purposes of the Accident Compensation Act, 1972."⁵⁹

There were, however, other commentators that maintained the opposite: That in fact the words of Section 5(1) did bar any proceedings associated with the injury. Taking such a position, A. Willey⁶⁰ maintained that the inclusion of the words "directly" or "indirectly" in the amendment to the Act before it came into force made it clear that the Act was to be the sole source of compensation for personal injury or death by accident and that injured persons were prevented from bringing any proceedings to recover losses suffered as a consequence of the accident but for which the Act provided no compensation. Considering the question of recovery of punitive damages under the Act, he noted that if Fogg v. McKnight, was to be followed in

New Zealand, that there had been an action available for recovery of punitive damages in personal injuries cases.

According to Willey, in order for punitive damages to still be recoverable, they would have to be "a proved loss necessarily and directly resulting from the injury" for the purposes of Section 121. Recognizing that the nature of such damages was not compensatory but to be a punishment to the defendant, he maintained that they did not come under the Act. While he recognizes this aspect, he also maintains that the Act is to be the sole source of compensation for personal injury or death and at the same time eliminates other forms of recovery not covered by the Act. He states:

"It would therefore appear that at common law an injured plaintiff was entitled to exemplary damages in an appropriate case.

It is also clear that after the passing of the Act the injured plaintiff in such cases cannot bring an action at common law to recover such damages because such an action is precluded by Section 5."

He then adds:

"It is also submitted that as such damages are in no sense compensatory, the injured plaintiff cannot claim any award pursuant to Section 131(1)."

He then adds to his again:

"Notwithstanding these contentions, however, cases involving personal injury may arise in the context of some other additional tort, say false imprisonment or intimidation, whereby the plaintiff can bring proceedings based on the false imprisonment or intimidation and give in evidence the facts of the personal injury as a ground for justifying an award of exemplary damages in respect of the other tort."⁶²

There does appear however, that there are some basic inconsistencies in Willey's argument. He advocates that the common law right of bringing a claim

for punitive damages is precluded by Section 5(1). He also recognises that punitive damages do not "recompense for a loss suffered by the injured person, but a punishment of the defendant", i.e., they are not "compensatory".⁶³ He sees the ACA as the "sole source of compensation for personal injury or death by accident". Therefore since the statutory scheme is the sole source of "compensatory" damages how can it be advocated that such a scheme eliminates an already recognized head of damage that is non-compensatory. It is submitted that his argument is based on an unstabled premise since compensatory and punitive damages are disparate remedies and it is not possible for a statute providing compensatory damages to eliminate a right of action to recover other damages that are not compensatory.

Also supporting the position that the ACA prevents a right to claim punitive damages is R.D. McInnes.⁶⁴ He takes the position that such damages do arise out of the injury to the plaintiff and are therefore barred by Section 5(1). He maintains that arise not because the defendant's conduct is contrary to law but rather because the conduct has affected the plaintiff. In other words, the plaintiff must be the victim in order for there to be an action for punitive damages. Since Section 5(1) does not require that the injury be the sole or most direct factor from which the damages arise, it can be asserted that such damages arise out of the injury. He states:

"It is only necessary that the damages in question arise in some way from injury to the plaintiff...punitive damages arise if and only if the plaintiff has suffered injury.

Thus punitive damages arise in some way out of the injury."⁶⁵

Based on this analysis of the situation, McInnes asserts that proceedings for punitive damages are proceedings for damages arising directly or indirectly out of the injury. Thus they are excluded Section 5(1).

These views of academic commentators certainly point to the fact that the issue of recovery of punitive damages in the era of the ACA was in a state of uncertainty. With these academic comments in mind, the next step in this analysis is to consider how the courts were to resolve this uncertainty.

(a) Judicial Interpretation: The same conflicting views emerge from the Supreme Court⁶⁶ decisions as were found amongst the academic comments before the issue was finally settled by the New Zealand Court of Appeal.⁶⁷ Before

considering the position taken by the Court of Appeal, these earlier decisions will be briefly considered.

There have been cases in which the Supreme Court has held that Section 5(1) is not bar to a claim for punitive damages in a personal injuries or death case. Mr. Justice O'Regan in the case of Howse v. The Attorney General⁶⁸ held that the proceedings for punitive damages in an assault case did not arise "directly or indirectly out of the injury" suffered by the plaintiff and were accordingly not barred by Section 5(1). The reason for this holding was that, in the view of the learned judge, punitive damages did not arise from the harm to the plaintiff but from the acts done contrary to law, the aim of which was to deter the recurrence of such acts.

In the case of Stowers v. Auckland City Council,⁶⁹ McMullin, J. felt that while the words of Section 5(1) excluded a claim for punitive damages when personal injury was involved, such a claim could succeed if there was no "personal injury, physical or mental". In another unreported case of Koolman v. Miller⁷⁰ in which the plaintiff pleaded that she did not allege personal injury, the claim limited to exemplary damages proceeded to judgment.

Most notable amongst those case holding to the contrary, i.e., that Section 5(1) was a direct bar to an action for punitive damages, was the case of Koolman v. Attorney General⁷¹, in which White, J. held that Section 5(1) of the ACA was intended to include both compensatory and punitive damages and therefore the ACA was a bar to a

claim for punitive damages. A similar view was expressed by Jefferies, J. in the case of Betteridge v. McKenzie⁷². Of all these cases, probably Lucas v. Auckland Regional Authority⁷³ was the most significant as the court went into great detail about the nature of punitive damages in a personal injury case. Mr. Justice Pritchard said that a claim for punitive (or aggravated) damages could not be brought independently of an action for compensatory damages. He expressed this in the following words:

"...The root stock onto which is grafted the claim for aggravated or exemplary damages - the substantive cause of action to which the claim for aggravated or exemplary damages has to be related - is almost invariably a cause of action in tort and very commonly a tort involving personal injury to the plaintiff. It follows that in order to determine whether a claim for aggravated or exemplary damages is within the ambit of the exclusive jurisdiction of the Accident Compen-

sation Commission, ...once it is seen that an element of the substantive cause of action is an injury to the person, it follows that the claim for aggravated or exemplary damages is a claim for damages arising out of personal injuries - and so within the exclusive jurisdiction of the Accident Compensation Commission."

Since Mr. Justice Pritchard saw punitive damages as being parasitic in the sense that they could not exist independently from compensatory damages, on this basis an action for punitive damages was thus excluded by the operation of Section 5(1) ACA.

It was amidst this lack of consensus in both academic and judicial opinion that the New Zealand Court of Appeal in the landmark case of Donselaar v. Donselaar⁷⁴ was to resolve the following three related issues:

- 1) Were punitive damages recoverable in New Zealand in a

personal injuries claim before
the coming into force of the
ACA?

2) If punitive damages had
been available, were pro-
ceedings for such damages
subsequently barred by the
coming into force of the ACA?

3) If such an action was
available and not barred by the
coming into force of the ACA,
in what circumstances were
punitive damages to be awarded?

As regards the first issue, all three
judges were in agreement that punitive
damages were available before the coming
into force of the ACA in personal in-
juries cases if the defendant acted with
contempt for his rights as a citizen⁷⁵

or if a defendant conducted himself in an outrageous manner in committing a tort.⁷⁶

The words of Section 5(1) of the Act were then examined so that the judges could determine whether or not the statutory provision was a bar to an otherwise available action for punitive damages. Since Section 5(1) used the words..."no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any court in New Zealand", were proceedings for punitive damages arising directly or indirectly out of the injury or death? Somers, J. referring to the intentions of the legislators in enacting the provisions, stated with reference to the words "directly" or "indirectly":

"The inclusion of those words seems likely to have been ex abundanti cautela as to include for example recovery of funeral

expenses when death has occurred and which would otherwise be recoverable...the most that can be asserted with confidence is that Parliament's attention was not directed to exemplary damages.

He saw, as did Richardson, J.,⁷⁸ that the subsection did not abolish causes of action but was concerned with remedies and left rights of action in tact.

Richardson, J.,⁷⁹ after noting the fact that punitive damages were not directed to the loss sustained by the plaintiff but instead to the defendant's conduct, concluded that such damages could not be said to arise "directly" or "indirectly" out of the injury or death.⁷⁹

Cooke, J.'s approach was different. He considered that there was nothing in the long title of the ACA to suggest that the legislation had any punitive purpose and that "the social reformers whose ideas inspired the legislation did

not deliberately set out to do away with exemplary damages following assault or battery".⁸⁰ However, looking at Section 5(1) more closely, Cooke, J. felt that as a "matter of semantics"⁸¹ it could be said that such damages did arise indirectly out of an accident, but he maintained that Parliament did not have the problem of punitive damages in mind when the provision was enacted.

Therefore, with all three judges holding that there was an action for punitive damages in New Zealand before the coming into force the ACA, and that the section of the Act (Section 5[1]) that excluded common law actions in cases of personal injury and death, referred to compensatory damages and left a right of action to claim punitive damages intact, the court then dealt with the third issue of the circum-

stances in which such damages were to be awarded. The question arose as to whether punitive damages could only be awarded in cases involving compensatory damages. Richardson, J. maintained that it was not necessary to include evidence of the compensatory loss when conducting a trial for punitive damages. Noting that Lord Devlin in Rookes v. Barnard, had refrained from saying that recovery of compensatory damages was a requisite to the recovery of punitive damages,⁸² he recognised that in the United States there was no uniform approach, but that punitive damages could be awarded in the absence of an award for compensatory damages so long as damage is shown to have been suffered. He found authority for this proposition in the case of Forth Worth Elevators Co. v. Russell⁸³ where the Supreme Court of Texas held

that notwithstanding that actual damages were not recoverable because of the Workmen's Compensation Insurance Legislation, the plaintiff who established an entitlement to actual damages but for the Compensation Act, could recover punitive damages.⁸⁴

Somers, J. did not come to the same conclusion. He laid down the rule that where the conduct of the tortfeasor merited punishment, punitive damages were only to be awarded if compensatory damages were insufficient to achieve that end. In order to determine this insufficiency and subsequently assess the amount that would satisfactorily punish the tortfeasor, some reference point in terms of the amount of compensatory damages must be known. Somers, J., while seeing that this approach would have to involve all the features

of a trial assessing compensation before the coming into force of the ACA, notes that there would be some difficulty in achieving this and since the ACA had removed the substratum of compensatory damages. Thus he advocates that "a new approach is necessary". He sees that the circumstances as a whole would have to be looked at (rather than considering whether compensatory damages are sufficient to punish) and the means of the parties would be material in this consideration.⁸⁵ He adds that there is a need for restraint in this area as is advocated by Cooke, J.

The position taken by Cooke, J. is different than that of the two other judges. While he did not suggest that an award for compensatory damages was a prerequisite for an award of punitive damages, he went a step further and said

that while "compensatory damages can no longer be awarded, exemplary damages will have to take over part of the former's role".⁸⁶ He then added the following cautionary statement:

"The courts will have to keep a tight rein on actions, with a view to countering any temptation, conscious or unconscious to give exemplary damages merely because the statutory benefits may be felt to be inadequate."⁸⁷

What is actually meant by these words is important. While Cooke, J. says that an award for punitive damages should not be made on the basis of the inadequacy of the compensatory benefit under the statute, he does recognise that in a proper case, i.e., one where the defendant acted with contempt for his rights as a citizen,⁸⁸ they take over part of the former role of compensatory damages. Cooke, J. obviously intended that a punitive award would

bridge the gap left between what would have been available as compensatory damages and what is in fact available under the statutory regime, and the means of the parties would be relevant in this process of assessment.

Therefore, from the foregoing, it is possible to extract the following rule as a guide to awarding punitive damages in personal injuries cases in New Zealand. The Accident Compensation Act does not bar an action for punitive damages when the defendant acted with contempt for his rights as a citizen or conducted himself in an outrageous manner in committing the tort. The assessment of such damages will involve a consideration of the circumstances as a whole in which the means of the parties will be a relevant consideration, along with a consideration of the extent to

which the statutory regime of compensation may be inadequate compensation compared with the recovery available but for the Act.

One point here must not go without mention. That is, in the judgment of Cooke, J. he added the proviso (to awarding punitive damages), that they would be awarded only if it was found that compensatory damages were not enough or punish the defendant.⁸⁹ Under the Statutory regime that governs personal injury and death by accident, when the action is brought in New Zealand, compensatory damages can never be considered as enough to "punish the defendant" simply because the defendant no longer has to compensate at all since all compensation is paid by the commission.⁹⁰ On this basis, the new approach that Somers, J. refers to may be to

punish the defendant for such things as failing to maintain safety standards which were once guarded against by fear of a large compensatory damage award against negligent employer or manufacturer. With this former effective safety deterrent removed by the introduction of the ACA, it is probably that it was this role that Cooke, J. was also referring to when he said that the role once played by compensatory damages was now taken over by punitive damages. It is submitted, that although the Justices did not expound on certain changes that have resulted in the bringing of such an action since the coming into force of the ACA, changes have been brought about and these will be considered in the next section.

Mention must also be made of the second New Zealand Court of Appeal deci-

sion dealing with this question of punitive damages handed down on the same day⁹¹ as Donselaar v. Donselaar, with the same judges presiding.⁹² This is the case of Taylor v. Beere⁹³, in which the court was confronted with determining whether the New Zealand Courts could award punitive damages and if so, should they be restricted in application to the categories of Rooks v. Barnard⁹⁴ and Brome v. Cassell and Co.⁹⁵ All three judges recognised that the availability of punitive damages was well entrenched in the law of New Zealand. Somers, J. concluded on this point:

"The concept of exemplary damages in tort was a part of common law and has always been part of the law of New Zealand. It has been recognised in innumerable cases in New Zealand in both the Supreme Court and the Court of Appeal. There is no profit in attempting to list such cases . . . It is now too late to hold that exemplary damages have no place in the

assessment of damages in tort
in New Zealand."⁹⁶

Coming to the second question of whether or not in awarding such damages they were to be confined to the categories of Rooks v. Barnard, Richardson, J. noted that New Zealand trial judges had continued to adopt the wider approach of the Australian and Canadian Courts rather than the House of Lords.⁹⁷ He then concluded by saying:

"I feel that in the New Zealand setting arbitrary limitations of the kinds formulated by Lord Devlin would be wrong in principle and unsatisfactory in practice."

Somers, J. while supporting that view, felt that there were two elements of the two English decisions that had continued relevance for the law of New Zealand. These included the distinction made between aggravated and exemplary damages which before the two English cases had

not been "so perceived and articulated",⁹⁸ and secondly the insistence that exemplary damages should only be awarded if the sum of compensatory and aggravated damages were not sufficient to punish.

While the court rejected the restrictiveness of Rookes v. Barnard, as a principle of law to be followed in New Zealand in the awarding of punitive damages, the preferred test to determine in what circumstances such damages should be awarded was that found in Mayne v. MacGregor on Damages.⁹⁹ That rule being that punitive damages could apply:

"...Only where the conduct of the defendant merits punishment, which is only to be considered to be so where his conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or as it is sometimes put, where he acts in contemptuous disregard of the plain-

tiff's rights."

The two Court of Appeal decisions appear to have settled once and for all the following principles relating to awarding punitive damages in the era of the Accident Compensation Act:

1) Punitive or exemplary damages as distinct from aggravated damages are directed towards the defendant's conduct so as to show that tortious conduct does not pay. Such damages are to be awarded for the purposes of punishment and deterrence. (Rookes v. Barnard, Taylor v. Beere.) They are to punish a defendant for his conduct while aggravated damages compensate the plaintiff. (Rookes v. Barnard, Huljich v. Hall¹⁰⁰ Taylor v. Beere).

2. Not restricted by the categories of Rookes v. Barnard, punitive damages will be available in New Zealand when the defendant acts in contumelious disregard of the plaintiff's rights, (Taylor v. Beere), where the defendant acted with contempt as a citizen (Donselaar v. Donselaar) or if a defendant conducted himself in an outrageous manner in committing

a tort (Donselaar v. Donselaar).

3. The Accident Compensation Act is not a bar to an action for punitive damages in a case of personal injury by accident even though a common law action for compensatory damages cannot be brought. (Donselaar v. Donselaar).

4. Punitive damages should only be awarded if compensatory and aggravated damages are not sufficient to punish, (Donselaar v. Donselaar, Taylor v. Beere) and the means of the defendant to be a consideration when making such an award (Rooks v. Barnard, Donselaar v. Donselaar).

Based on the foregoing account of the law of punitive damages in New Zealand, such damages are available in cases involving personal injury accident and since such damages are available in a negligence action as established in the earlier case of Furniss v. Fitchett, the application of these principles to liability for defective products will be considered.

Before applying these principles to a case involving products liability, there are certain changes that have been brought about due to the coming into force of the ACA in the bringing of such a claim. It is these changes that will be briefly considered next.

4. CHANGES MADE IN BRINGING A PUNITIVE DAMAGES CLAIM AS A CONSEQUENCE OF THE ACA:

Prior to the coming into force of the ACA, other than in a case involving trespass to person, recovery of both compensatory and punitive damages depended on establishing negligence. If there was no duty of care owed to the plaintiff, no matter how outrageous the defendant's behavior, punitive (or compensatory) damages could not be recovered. Where there is no personal injury, punitive damages alone could be awarded,

but once again recovery was dependent on sustaining an action in negligence. The ACA has however changed this situation. Now compensatory and punitive damages have been severed in the sense that recovery of the former are no longer dependent on fault while the latter are. A second consideration which results from this situation relates to the way punitive damages are not to be pleaded. Prior to the coming into force of the ACA since exemplary damages did not have to be pleaded separately, it was in fact difficult to know what amount of the award was for punitive as opposed to compensatory or some other head of damages. In a case involving personal injury or death, where compensatory damages are recoverable under the statutory regime of periodic payments in the case of personal injury

and a lump sum payment in the case of death, a separate action pleading only punitive damages would now have to be brought.

With these considerations in mind, the focus will now be on the requirements of maintaining an action for punitive damages against the manufacture of a defective aircraft which has resulted in personal injury or death under the law of New Zealand.

5. THE LAW OF PRODUCTS LIABILITY IN NEW ZEALAND

In New Zealand, while "products liability" is not a new tort in consumer protection as it virtually is in the United States,¹⁰¹ nevertheless, there is redress for damage caused by defective products in both tort (negligence) and contract (breach of implied or express warranty of fitness, under the Sale of

Goods Act, 1908). Since the concern in this article is with punitive damages which are available in tort and not contract,¹⁰² it is the sustaining of an action in tort, by proving negligence, that will be considered. Any consideration of an action in negligence for defective products must begin with the words of Lord Aitkin in Donaghue v. Stevenson, when he said:

"...a manufacturer of products while he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take the reasonable care".¹⁰³

Having established that there is a duty of care owed to the ultimate consumer for defective products, the stan-

dard of care demanded from a manufacturer acquired what essentially amounted to strict liability by the application of the principle of res ipsa loquitur. In other words it is inferred from the happening of the damaging event that it was probably due to the defendant's negligence. This was the approach of the Privy Council in the case of Grant v. The Australian Knitting Mills, 104 where Lord Wright stated:

"Negligence is found as a matter of inference from the existence of the defects taken in connection with all the known circumstances; even if the manufacturers could by apt evidence have rebutted that inference they have not done so."¹⁰⁵

It should however be mentioned that although the application of the principle of res ipsa loquitur essentially amounts to strict liability which is the regime under which products liability operates

in the United States,¹⁰⁶ there is however an important difference between negligence, with res ipsa loquiter and strict liability. That difference is that negligence still applies the standard of reasonableness. Based on the principles laid down in Donaghue v. Stevenson, and Grant v. Australian Knitting Mills, New Zealand and other Commonwealth courts have applied these principles to cases of defective food and drink,¹⁰⁷ cosmetics,¹⁰⁸ underwear,¹⁰⁹ motor cars¹¹⁰ and elevators¹¹¹ to mention but a few instances.

As was pointed out in the Report of the Torts and General Law Reform Committee of New Zealand on Products Liability (1974), the courts have applied liberally the "neighbour" principle in defining the appropriate class of defendants, and as far as the appropriate class of

plaintiff is concerned, this is to be a "consumer" which is to be any person who ought reasonably to have been foreseen as likely to be affected by the defect.

Based on the foregoing, in order to sustain an action for punitive damages in a products liability case involving a defective aircraft, the plaintiff would have to establish a duty, applying Lord Aitkins' rule and it is likely that the court would apply the principle of res ipsa loquiter and thus negligence would be inferred from the facts. Proceeding on this basis, the principles discussed in this article are now applied to the case of Bennett v. Enstrom Helicopter Corp.

6. APPLICATION OF THE PRINCIPLES RELATING TO RECOVERY OF PUNITIVE DAMAGES IN NEW ZEALAND TO THE CASE BENNETT V. ENSTROM HELICOPTER CORP.

Before applying the principles dis-

cussed, the issues involved in this case must be briefly mentioned. The facts were that Enstrom Helicopters, a Michigan Corporation, had manufactured the helicopter, which it was asserted by the plaintiff, caused the fatal death of her husband. Recovery was sought under the Michigan Wrongful Death Statute¹¹² based on breach of implied warranty of fitness, breach of express warranty, negligence and breach of implied duties of care owed to a bailee. The specific defect in design, upon which the action against the manufacturer was based, was in the method used to attach the induction hose which allowed it to disengage from its attachment. With the loose end being in close proximity to the air filter box resulted in it being sucked into contact with the filter box, which had the effect of depriving the engine of

its normal air supply causing the engine to stop. With prior notice of this inherent defect and associated danger, the manufacturer had failed to inform the plaintiff of the defect.

Hillman, J. in the District Court,¹¹³ applying the lex loci delicti rule (the substantive law of the place of the wrong), maintained on the basis of affidavit evidence from a former Prime Minister of New Zealand, Sir John Marshall, that the ACA was an "exclusive remedy."¹¹⁴ The affidavit referred to Section 5(1) of the ACA and placed no significance on the words "in New Zealand". It is submitted that the court misconstrued the statute on the basis of the expert's affidavit as did the Court of Appeals for the Sixth Circuit. This submission is based on the fact that this was an enactment in a foreign

court, applying the law of New Zealand, which in this case, they were.¹¹⁵ It is submitted that applying the law of New Zealand, the circumstances of the damaging event in the case gives rise to a cause of action in which both compensatory and punitive damages can be claimed. Focusing on recovery of punitive damages, it is the submission of the writer that applying the principles of the law of negligence in the case of defective products, and punitive damages as outlined in this article to the case of the manufacturer of a defective aircraft, there is a strong likelihood of recovery. When the defendant has paid no compensatory damages at all, even though in the case of Bennett v. Enstrom Helicopter Corp., this was based on a misconception of the New Zealand Statute, this is all the more reason for

awarding punitive damages keeping in mind the words of Cooke, J.¹¹⁶ that punitive damages are to take over part of the former role of compensatory and aggravated damages which have been replaced, when the action is brought in New Zealand, by ACA. This would be particularly so in an area of the law, namely products liability, which is ultimately concerned with "consumer safety".

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FOOTNOTES

¹ For the sake of brevity, the term "punitive" will be used throughout this article. Although the New Zealand courts tend to use the term "exemplary" more frequently, the United States courts more often use the term "punitive" when a claim for such damages is brought against a manufacturer of a defective aircraft.

² The following is the long title of the Principle Act as amended by the Accident Compensation Amendment (No.2) Act, 1973, which came into force April 1, 1974:

"An Act to make provision for safety and the prevention of accidents; for the rehabilitation and compensation of persons who suffer personal injury by accident in respect of which they have cover under the Act; for the compensation of certain dependents of those persons where death results from the injury and for the abolition as far as practicable of actions for damages arising directly or indirectly out of personal injury by accident and death resulting therefrom and certain other actions." (From now on to be referred to as the ACA).

This legislation resulted from the recommendations of a Royal Commission set up in 1966 under the chairmanship of Mr. Justice Woodhouse (as he then was). The Commissions report, entitled "Compensation for Personal Injury in New Zealand - Report of the Royal Commission of Inquiry", also referred to as "The

Woodhouse Report", recommended that all injured persons should receive compensation from a community financed scheme on the same uniform method of assessment irrespective of the cause of the injury. Two years after the release of the Woodhouse Report, the New Zealand Government punished its recommendations in the form of a White Paper and then the following year a Select Committee of the New Zealand Parliament published a report. An Interdepartmental Committee on Compensation then began drafting the Bill which became the ACA, 1972. For a full account of the legislative history of the Act see Palmer, "Accident Compensation in New Zealand: The First Two Years". 25 Am.J.Com.P. 1, (1977).

³ C. A. 144/77. Judgment March 19, 1982.

⁴ 17 Avi. 109.

⁵ The earliest reference to punitive damages is to be found in the Bible, where it is stated:

"For all manner of trespass whether it be for ox, for ass, for sheep, for raiment or for any manner of lost thing, which another challengeth to be his, the cause of both parties shall come before the judges; and whom the judges shall condemn, he shall pay double unto his neighbor." Exodus 22:9 (King James).

See - Donald M. Haskell, "The Aircraft Manufacturer's Liability For Design and Punitive Damages - The Insurance Policy"

and the Public Policy." 40 J.A.L.C. 595, 608, (1974), and Victor B. Levit, "Punitive Damages: Yesterday, Today and Tomorrow." Insurance Law Journal, 257, 259, (1980), and David G. Owen "Punitive Damages in Products Liability Litigation" 74 Michigan L.R. 1259, 1262 (1976).

According to Levit, within the common law, punitive damages date back to the year 1278 with the enactment of the statute of Gloucester, 6 Edward 1, Chapter 5, which awarded treble damages to the injured party for waste. The first two reported cases in which exemplary damages were referred to were in the year 1763. These were Wilkes v. Wood (1763), Lofft 1. and Huckle v. Money (1763), 2 Wils 205. In the first of these two cases Pratt C. J. in his direction to the jury said:

"Damages are designed not only as satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury of the action itself."

In the United States the first reported decision involving an action for punitive damages is Genay v. Norris, 1 S.C. 3, 1 Bay 6 (1784). Most notable of the early U.S. decision on punitive damages was Day v. Woodworth, 54 U.S. 363, 371 (1851) in which Mr. Justice Grier, delivering the opinion of the court saw the awarding of what he called "exemplary, punitive or vindictive damages" as a "well established principle of common law".

A notable earlier decision was that of McNamara v. King, 7 Ill. (2 Gilm) 432, 436 (1845) when it was held that punitive damages awarded in assault and battery cases were "not only to compensate the plaintiff, but to punish the defendant."

6 Fleet v. Hollenkemp, 52 Ky. 175, 13 B. Mon. 219 (1852). This case involved illness resulting from a medicine prescribed by a doctor and negligently prepared by a pharmacist who mixed in poison. The court upheld a punitive damages award of \$1,141.75 on the basis that it was the conduct of a defendant that was important in awarding such charges. See - J.D. Ghiardi and J.J. Kircher "Punitive Damage Recovery in Products Liability cases" 65 Marquette L.R. 1, 2 (1981).

7 234 Ala. 598, 171 So. 332 (1937).

8 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967).

9 378 F.2D 832 (2d Civ. 1907).

10 Ibid p. 839.

11 Strugar v. Guill N.C. App 277 S.E. 2d 126.

12 No. 19-77-61 (Super. Ct., Orange Cty., Cal., Feb. 7, 1978), aff'd as amended, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981).

13 38 Cal. App. 3d Q50 113 Cal. Rptr. 416 (1974).

14 Rosenden v. Avco Lycoming, Superior Court, Santa Clara Cty. Ca., Mar. 8, 1972. Another case in which punitive damages were awarded against an aircraft manufacturer was in the unreported case of Smith v. Cessna Aircraft Co., Texas, 103rd. Judicial District Ct. of Dallas Cty., No. 70-9255-L, Nov. 6, 1972 (16 ATLANL 30), also Gregory v. Beech Aircraft Co. and consolidated cases, Orange City Sup. Ct. Calif., 1971 (14 ATLANL 386).

15 "The Accident Compensation Act 1972 and Exemplary Damages". NZLR (1982).

16 INZ Jur. 49, 54.

17 (1888) NZLR 663.

18 Ibid. p.665, per Richmond, J.

19 (1909) 29 NZLR 249, 256.

20 [1920] NZLR 17.

21 [1930] NZLR 151.

22 Ibid. p. 160.

23 [1933] NZLR 235.

24 Ibid. p.240.

25 [1958] NZLR 396, 399, 401.

26 [1964] 1 All E. R. p. 367.

27 Comments on this by Lord Denning in Broome v. Cassell [1971] 1 All E. R. 187.

- 28 Ibid. p. 407.
- 29 Ibid. p. 410.
- 30 Ibid. p. 411.
- 31 Ibid. p.411.
- 32 [1953] 1 All E. R. 741.
- 33 117 C.L.R. p. 188.
- 34 117 C.L.R. p. 185.
- 35 p. 122 per Mr. Justice McTiernan.
- 36 Ibid. p. 122.
- 37 Ibid. p. 139.
- 38 Ibid. p. 102.
- 39 Ibid. p. 154.
- 40 Ibid.
- 41 [1969] 1 AC 590.
- 42 [1968] NZLR 330.
- 43 Ibid. p. 333.
- 44 Although the question of precedent was not discussed in Fogg v. McKnight, the case of Corbett v. Social Security Commission [1962] NZLR, 878 is authority for the principle that except in very exceptional circumstances, New Zealand courts, when confronted with conflicting decisions of the Privy Council and the House of Lords on the same point of law, should follow the Privy Council.

Comments on Fogg v. McKnight - see M.A. Vennell, "The Scope of National No-Fault Accident Compensation in Australia and New Zealand". 49 A.L.J. 22, 28 (1975), "The Accident Compensation Act 1972 and Exemplary Damages". 17 NZLUR 194 (1968). A. G. Mercer "Fogg v. McKnight - Compensation or Punishment". NZLJ 597, [1969].

45 Sections 60-64 ACA (as amended by the ACA Amendment No. 2, 1973).

46 Section 5(1) see M.A. Vennell, Residual Liabilityites Under the New Zealand Accident Compensation Scheme. Australian Insurance Institute Journal. 14 (1980).

47 As amended by the Accident Compensation Amendment Act (No. 2) 1973.

48 "Some Kiwi Kite-Flying" NZLJ 254 (1975).

49 Ibid. p. 256.

50 Ibid. p. 256.

51 The case of Furniss v. Fitchett is authority for the fact that punitive damages alone are recoverable in negligence. It appears that in that case only punitive damages were pleaded and it was those damages that were recovered.

52 (1699) 1 Ld. Raym 339, 91 E.R. 1122.

53 Ibid. p.255.

54 "Proceedings for Punitive Damages in the Regime of Accident Compensation"
NZLJ 158 (1978)

55 Ibid p. 158.

56 Ibid p. 163.

57 Ibid p. 164.

58 (Footnote omitted)

59 Ibid p. 164.

60 "The Accident Compensation Act and Recover For Loss Arising from Personal Injury and Death by Accident" 6 NZLUR 250 (1975).

61 (Footnote omitted)

62 Ibid p. 269.

63 Ibid p. 267.

64 "punishing the Words of Section 5(1) The Other School of Thought Replies"
NZLJ, 8, (1979).

65 Ibid p. 9.

66 Reconstituted as the High Court by 1979 Amendment of the Judicature Act, 1908.

67 Donselaar v. Donsellar.

68 Unreported decision: S.C. Palmerston North, A132/75. Judgment 22 December.

69 Auckland A. 1064/77. Judgment 2 May.

- 70 Wellington 175/78.
- 71 Wellington A. 519/76. Judgment 3 October, 1977.
- 72 Wellington A. 103/77. Judgment 7 November, 1978.
- 73 Wellington A. 1003/79. Judgment 24 March, 1980.
- 74 The New Zealand Court of Appeal. 145/77. Judgment March 19, 1982.
- 75 Per Cooke, J. p. 17.
- 76 Per Richardson, J. p. 5.
- 77 Ibid. p. 10. (Footnote omitted in text)
- 78 Ibid. p. 4, 5.
- 79 Ibid. p. 5.
- 79 (footnote omitted)
- 80 Ibid. p. 20.
- 81 Ibid. p. 20.
- 82 Ibid p. 7.
- 83 (1934) 70 SW 2d 397; 123 Tex 128.
- 84 Ibid p. 11.
- 85 p. 13.
- 86 p. 25.
- 87 p. 25.

- 88 See Footnote 51.
- 89 Ibid p. 17.
- 90 Indirectly employer pay a levy under Section 71 ACA as do Motor Vehicle owners under Section 98.
- 91 March 19, 1982.
- 92 Cooke, Richardson and Somers, JJ.
- 93 Unreported Judgment, CA 38/80.
- 94 [1964] AC. 1129.
- 95 [1972] AC. 1027.
- 96 p. 4.
- 97 p. 5.
- 98 Ibid p. 8.
- 99 12th Ed., (1961), p. 196.
- 100 [1973] 2NZLR 279, 287. per McCarthy, J.
- 101 C.J. Tobin, "Products Liability: A United States Commonwealth Comparative survey" 3 NZULR 377 (1969).
- 102 Furniss v. Fitchett.
- 103 [1932] AC. 562, 599. This was 16 years after similar words had been uttered by Cardozo, J. in MacPherson v. Buick Motors Co., 217 N.Y. 382, 111 N.E. 1050.

- 104 [1936] A.C. 85.
- 105 Ibid, p. 101.
- 106 This concept is stated in para 402A Restatement of Torts, 2d.
- 107 Read v. Croydon Corp, [1938] 4 All E.R. 631, Barnes v. Irwell Valley [1939] 1 K.B. 21.
- 108 Watons v. Buckley, [1940] 1 All E.R. 174.
- 109 Grant v. Australian Knitting Mills, [1936] A.C., 85.
- 110 Hersental v. Steward and Ardern, [1940] 1 K.B. 155.
- 111 Hazeldine v. Daw, [1941] 2 K.B. 343.
- 112 M.C.L.A. 600.2922, M.S.A. 274, 2922.
- 113 Unreported Decision, Case No. M75-59 CA 2 District Court for the Western District of Michigan Northern Division. Date of Judgment, Nov. 12, 1980.
- 114 Ibid, p. 2.
- 115 See earlier note on this point. S. 131.
- 116 Donselaar v. Donselaar.

Office: Supreme Court, U.S.

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ALEXANDER L. STEVAS,
CLERK

No. 82-1176

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

October Term, 1982

WYNETTE E. BENNETT, Administratrix of
the Estate of EDWIN N. BENNETT,

Petitioner,

vs.

ENSTROM HELICOPTER CORPORATION,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Sixth Circuit

BRIEF FOR RESPONDENT

Edward D. Wells
Counsel of Record for Respondent
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QUESTIONS PRESENTED FOR REVIEW

- I. IS THERE ANY SPECIAL AND IMPORTANT REASON FOR THIS HONORABLE COURT TO GRANT WRIT OF CERTIORARI UNDER SUPREME COURT RULE 17?
- II. WILL THIS COURT CONSIDER AN ISSUE NOT PLEADED OR RAISED IN EITHER THE DISTRICT COURT, OR THE COURT OF APPEALS UNTIL AFTER DENIAL OF A DELAYED MOTION FOR REHEARING IN THE COURT OF APPEALS?
- III. HAS THE COURT OF APPEALS ERRED IN ITS DECISION?

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OPINIONS AND JUDGMENTS DELIVERED BELOW

In addition to the opinions of the Court of Appeals set forth in the plaintiff's brief at page 5, it is also to be noted that following the denial of the first motion for rehearing, 686 F2d 406, on August 12, 1982 (A5), on or about November 9, 1982, the plaintiff then filed a motion to enlarge the time, and also a petition for second rehearing based on the contention, for the first time, that exemplary damages were not barred by the New Zealand Accident Compensation Act, citing Donselaar v Donselaar. In opposition to that motion, the defendant argued that plaintiff had never pleaded or raised the question before the District Court and quoted from United States Ex Rel Huisinga v Commanding Officer, 446 F2d (8 CA) 124 (1971), "it is an elemental rule of appellate jurisdiction that a reviewing court

will not ordinarily rule on issues not properly presented or raised in the trial court * * *. Similarly, an appealing party is precluded from altering the theory on which the case was tried in the lower court." Also it was pointed out that the plaintiff did not comply with Rule 44.1 of the Federal Rules of Civil Procedure, and lastly that the Donselaar case is not applicable to the facts of our instant case.

The Court of Appeals, by order dated December 6, 1982, denied the plaintiff's Motion to Enlarge Time to file second Petition For Rehearing (A 14-15).

COUNTER-STATEMENT OF THE CASE

We submit the plaintiff, at page 8 of her brief, has made a statement which does not appear in the appendix. It is stated: "The engine failure which caused the accident was familiar to Meger, because identical failures had caused accidents while a helicopter was being tested in the United States."

Reference to the deposition of Mr. Meger fails to substantiate that statement. Mr. Meger testified that once, at the plant, a backfire had occurred on a start-up and he had gotten out of the helicopter and found the hose detached (Meger deposition, p 40). There was no testimony the hose blocked up and caused the engine to quit. And further, he testified that after the accident in New Zealand, he found the hose detached at the air filter end but you would still be getting air to the

engine if you had a loose flopping hose. They did not believe at that time after bending the hose around and all over that the loose end could get on a big enough flat surface to shut off the air to the engine (Meger deposition, p 36). In other words, Mr. Meger was certainly not familiar with the cause of the engine failure prior to the time of the accident. No engine had previously failed even once before the accident because of that cause.

We submit the following additional facts: The District Court opinion states:

"Plaintiff seeks recovery of \$1 million damages under the Michigan Wrongful Death Act, MCLA §600.2922; MSA27A. 2922, on four counts: breach of implied warranty of fitness, breach of express warranty, negligence, and breach of implied duties of care owed to the bailee."

(A 17; see also A 26).

Then on appeal to the Court of Appeals for the Sixth Circuit, only one question was presented in the plaintiff's brief:

"WHETHER THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN HOLDING THAT THE NEW ZEALAND ACCIDENT COMPENSATION ACT BARRED A NEW ZEALAND PLAINTIFF FROM BRINGING A WRONGFUL DEATH CLAIM UNDER MICHIGAN LAW IN A MICHIGAN COURT AGAINST A NEGLIGENT MICHIGAN DEFENDANT, WHERE THE LAW IN SUPPORT OF THE DISTRICT COURT'S DECISION IS NEUTRAL AT BEST, AND THE PUBLIC POLICIES OF BOTH NEW ZEALAND AND MICHIGAN FAVOR RECOGNITION OF SUCH AN ACTION IN MICHIGAN."

(Our underlining).

And at page 11 of the brief, it is said:

"When these equities are weighed, in conjunction with the undisputed factual record, there can be no doubt that the District Court committed reversible error in holding that the New Zealand Accident Compensation Act barred a New Zealand plaintiff from bringing a Wrongful Death claim under Michigan law in a Michigan court against a negligent Michigan defendant, where the law in support of the District Court's decision is neutral at best and the public policies of both New Zealand and Michigan favor recognition of such an action in Michigan."

The opinion of the Court of Appeals reads in part:

"The lex loci, the law of New Zealand, no longer permits common law personal

injury actions. New Zealand has instead created a comprehensive administrative scheme of no-fault compensation for persons injured there. See generally Palmer, Accident Compensation in New Zealand: The First Two Years, 25 Am. J. Comp. L. 1, passim (1977).

"On appeal, Bennett argues that the district court misconstrued New Zealand statutes or erred in applying New Zealand law. She points out that the New Zealand Compensation Act provides that no person covered under the Act may bring a personal injury action 'in any court of New Zealand independently of this act' Id. §5(1). Bennett's argument is that since her action was not brought 'in any court of New Zealand,' then this exclusive-remedy provision does not apply to her case. We agree, of course, with Bennett's implicit premise that the New Zealand legislature cannot restrict the jurisdiction of the courts of other sovereign states. We reject her conclusion that if the New Zealand Act's exclusive-remedy provision is inapplicable, then a Michigan court, ostensibly applying New Zealand substantive law, would ignore the rest of the Compensation Act and apply the Michigan Wrongful Death Act to her case. There is simply no longer, under New Zealand substantive law, a common law tort action for persons covered by the Compensation Act. Bennett is covered by the Act, and has in fact received compensation under it. If the lex loci applies, plaintiff Bennett loses.

"Bennett prevails only if there is some reason to bend the Michigan conflicts rule of lex loci delicti.

* * *

"Bennett has pointed out no expression of public policy in any of these sources that would support application of Michigan substantive law to every case in which a product manufactured there has caused personal injury."

(A. 2-3).

Plaintiff then filed a petition for rehearing relying on Sexton v Ryder Truck Rental, Inc, 413 Mich 406 (1972). In our brief in opposition to plaintiff's petition, we stated:

"And in the Sexton and Storie cases, a majority of the Michigan Supreme Court, consisting of seven members, have held lex loci delicti applies unless the parties are both Michigan residents."

Upon reconsideration of the petition for rehearing based on the two Michigan cases, the Court of Appeals said in part:

"Since this Court's original decision in this diversity case, the Supreme Court of Michigan has substantially changed the relevant law of

that state by its decisions in Sexton v Ryder Truck Rental, Inc. and Storie v Southfield Leasing, Inc., Nos. 61606, 63362 (Mich., June 14, 1982) (hereinafter Sexton). The determinative issue in this case remains whether a Michigan court would apply Michigan substantive law, the lex fori, to Bennett's action. Bennett's petition for rehearing relies on Sexton in arguing that Michigan would now apply its own law. We reaffirm our earlier holding that Bennett's cause would be decided by a Michigan court according to New Zealand substantive law, the lex loci delicti, which would bar the action, and we note that this holding is not attacked in Bennett's petition for rehearing."

(A. 6-7).

* * *

"We believe that a Michigan court would find the following reasons for applying the law of New Zealand to this case:

"'The plaintiff and her decedent were New Zealanders at the time of the alleged torts (D. Ct. mem. op. at 1);

"'The plaintiff has received compensation for her injury under the laws of New Zealand (id at 2);

"'The flight on which Mr. Bennett died began and ended in New Zealand (id. at 4).

"'The fatal helicopter had been shipped to New Zealand for sale and use there (id.);

"'There was no helicopter sale and no employment contract between Mr. Bennett and Enstrom of Michigan, although there may have been business contracts between them in Michigan (id. at 5);

"'The fatal helicopter had been lent to Mr. Bennett for his own purposes on the day of his death (id.).'

"Bennett has not challenged any of these findings of fact as clearly erroneous. Singly and together, these facts show that the State of Michigan has little interest in applying its own laws to this case."

(A. 10-11).

As previously noted, the motion to enlarge the time and also a petition for second rehearing was filed, reading in part as follows:

"All of the arguments previously filed by the plaintiff in this diversity action have addressed the legal and equitable reasons for applying Michigan substantive law."

* * *

"However, the New Zealand Accident Compensation Act has recently been interpreted to permit a cause of action for exemplary or punitive damages under circumstances similar to those in the instant case. Donselaar v Donselaar, (Docket No. CA 145/77, March 19, 1982) Since the United States Court of Appeals has determined to apply New Zealand law, and New Zealand law permits the plaintiff to maintain an action for exemplary damages, dismissal of the plaintiff's claim is no longer warranted.

* * *

"Accordingly, Plaintiff prays that this Honorable Court remand this cause to the United States District Court for the Western District of Michigan for further proceedings consistent with the opinion which has been rendered by the New Zealand Court."

By order filed December 6, 1982, the Court denied the plaintiff's motion to enlarge the time to file second petition for rehearing (A. 14-15).

Plaintiff-petitioner has now filed this petition for writ of certiorari alleging, page 13 of her brief, as "REASONS FOR GRANTING THE WRIT": "THE COURT OF APPEALS REFUSED TO FOLLOW THE DECISIONS OF

"THE MICHIGAN SUPREME COURT AND THE NEW ZEALAND COURT OF APPEALS, WHICH WERE ISSUED SUBSEQUENT TO ORAL ARGUMENT IN THE SIXTH CIRCUIT, AND TOGETHER PERMIT PLAINTIFF TO MAINTAIN HER CAUSE OF ACTION".

ARGUMENT

- I. THERE IS NO SPECIAL AND IMPORTANT REASON FOR THIS HONORABLE COURT TO GRANT WRIT OF CERTIORARI UNDER SUPREME COURT RULE 17.

Supreme Court Rule 17.1 reads as follows:

"A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

"(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal

question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

"(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

"(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

This case was brought in the Federal Court solely by reason of diversity of citizenship with no involvement of any federal question of law. We submit that petitioner fails to come within any of the criteria set forth in said rule.

II. THE SUPREME COURT WILL NOT REVIEW A
MATTER NOT PLEADED IN THE COMPLAINT
AND NOT CONSIDERED BY THE DISTRICT
COURT OR THE COURT OF APPEALS.

Prior to the filing of this petition for writ of certiorari, petitioner has always argued that the law of New Zealand did not prevent her from recovery under the wrongful death act of Michigan. Never before has the plaintiff contended as she now does at page 17 of her brief that in addition to the remedy under the New Zealand Accident Compensation Act, she also may recover under the common law remedy for wrongful death based on negligence, and then in a footnote acknowledges that at common law the action dies with the litigant, but that was displaced by the 1936 Law Reform Act as well as the 1952 Act presumably both being New Zealand death acts enacted prior to the ACA Act. In other words, she now for the first time

claims a right to recover under a New Zealand wrongful death act. Incidentally, petitioner has failed to comply with Rule 44.1 of the Federal Rules of Civil Procedure and has also failed to set forth the New Zealand act in the appendix as required by Supreme Court Rule 21.1(f).

Plaintiff is now arguing a position not set forth in her Complaint or relied upon in either the District Court or the Court of Appeals. We submit that the Court of Appeals as well as this Court will not entertain such a position under these circumstances. (In a succeeding section, we take issue with plaintiff's position that a cause for tort damages under a New Zealand wrongful death act occurring in New Zealand is maintainable).

Also, plaintiff has never pleaded a right to exemplary damages (A. 206) nor

previously claimed before the District Court, nor in the Court of Appeals until her delayed petition for second rehearing that she is entitled to rely on exemplary damages. In addition to the cases previously cited that a Court of Appeals will not usually consider matters raised for the first time on appeal, nor permit an altering of theory for the first time on appeal, we also cite Miree v DeKalb County Ga., 97 SC 2490, 433 US 25, 53 L.Ed.2d 557.

III. THE COURT OF APPEALS HAS NOT ERRED IN ITS RULINGS.

- (a) NEW ZEALAND ACCIDENT COMPENSATION ACT OF 1972 DOES NOT PERMIT A RECOVERY UNDER ANY ALLEGED NEW ZEALAND WRONGFUL DEATH ACT FOR A DEATH OCCURRING IN NEW ZEALAND.

The title of ACA reads:

"An Act to make provision for safety and the prevention of accidents; for the rehabilitation and

compensation of persons who suffer personal injury by accident in respect of which they have cover under the Act; for the compensation of certain dependents of those persons where death results from the injury and for the abolition as far as practicable of actions for damages arising directly or indirectly out of personal injury by accident and death resulting therefrom and certain other actions."

(A. 274, 94). (Our underlining).

The 1972 ACA is very lengthy. Briefly, however, the Act is a no-fault act providing fixed cover for any person injured or killed in New Zealand. In addition, it applies cover to certain persons injured or killed outside New Zealand, namely New Zealand seamen, airmen, members of the armed forces, diplomats, or an employee or employer injured outside New Zealand within twelve months of the time he temporarily left New Zealand.

Section 5(1) (a) provides that no action for personal injuries or death shall lie where that person has cover under the

Act "except any action which lies in accordance with section 131 of this Act". (A. 30). Dr. Palmer, cited in our Court of Appeals decision, states that section 5 should be interpreted "as barring all actions for damages, save punitive damages in the narrow range of circumstances in which they should be available where personal injury by accident is covered under the Act." (A. 116). Section 131 provides: "Compensation under Act in cases where claim lies over seas etc.
"(1) In any case where a person suffers injury by accident outside New Zealand or dies as a result of personal injury so suffered, if the person has cover under this Act."
(A. 33-34). (Our underlining).

And if an action lies for damages under the laws of that country, then, the action for damages may be maintained and an offset against the cover under the ACA is effected.

Thus, this would give a seaman, for example, who suffered an injury or death while in Michigan, a right to recover

damages under Michigan law.

The amendment (A. 36) enacted in 1978, four years after the accident in question, and we submit not applicable, provides that an action may be maintained under section 131 where the injury occurred either inside or outside New Zealand. Again we submit that only applies if Michigan, for example, permits recovery to a New Zealand person, for example, injured in New Zealand. In other words, as stated in the opinion of the Court of Appeals, "the New Zealand legislature cannot restrict the jurisdiction of the courts of other sovereign states". However, that does not thereby mean that New Zealand states that the Michigan Wrongful Death Act shall apply to a New Zealand resident who suffers an accident in New Zealand.

As previously noted, plaintiff sought recovery under the Michigan Wrongful Death

Act (A. 270). Now petitioner seeks recovery under an alleged New Zealand wrongful death act.

Petitioner has concluded by stating in her brief, pages 19-20:

"In disregarding this obligation, the court of appeals sanctions a gross miscarriage of justice, depriving this petitioner of the recovery she could have obtained if suit had been brought in New Zealand in the first instance."

We respectfully submit that there has never been any question that if the case were brought in New Zealand, petitioner would clearly be barred from recovery of damages under any New Zealand wrongful death act. Plaintiff cites no case to support her present position.

- (b) MICHIGAN APPLIES THE LAW OF LEX LOCI, NAMELY THE LAW OF MICHIGAN, ONLY WHERE BOTH PARTIES, INJURED IN ANOTHER STATE, ARE MICHIGAN RESIDENTS.

As previously noted, the plaintiff

and decedent were residents of New Zealand, the accident occurred in New Zealand, and the plaintiff was granted recovery under the New Zealand Accident Compensation Act. The majority of the Supreme Court in the recent case of Sexton v Ryder Truck Rental, 413 Mich 406, 320 NW2d 843 (1982), would hold that under such circumstances the law of New Zealand, not the law of Michigan, would be applicable.

The Court of Appeals did not err in so holding.

(c) EXEMPLARY DAMAGES NOT RECOVERABLE
UNDER THE UNDISPUTED FACTS OF
THIS CASE.

Although New Zealand has recognized the right to exemplary or punitive damages since the year 1278 (A. 276), and although the argument that the New Zealand ACA did not bar actions from exemplary damages was available to the plaintiff had she chosen

to raise it, it was not raised until the delayed second petition for rehearing before the Court of Appeals. In other words, this is not a case where the New Zealand court has changed or overruled prior law.

In any event, in Donselaar v Donselaar decided March 19, 1982 and now relied upon by the petitioner, the defendant struck his brother with a hammer on the head during an altercation (A. 37-38, 87-88).

The lengthy opinion by all three judges of the New Zealand Court of Appeals (A. 37-131) held that an action for exemplary or punitive damages is not barred by the New Zealand ACA. After defining exemplary or punitive damages, the court concluded that the facts of that case did not merit recovery of exemplary damages (A. 6).

Each of the judges stated that exemplary damages are not compensation but

are for the purpose of punishment and as a deterrent to highhanded contumelious activity (A. 41, 54, 58, 64, 76, 78, 79, 127).

Judge Sommers stated: "I express my agreement with the observation of Cooke J. about the need for restraint in this area" (A. 60).

Judge Richardson concluded his opinion by stating that plaintiff merely pleaded what in reality were compensatory damages (A. 84). That the wrangling was instigated by plaintiff as the principal irritant (A. 84).

Judge Cooke quoted from Dr. Palmer that the conduct must be so wanton as to be akin to an intentional tort (A. 116). Judge Cooke also said "the number of cases will not be many" (A. 118). The judge continued by stating, "I think there is need to have effective sanctions against the irresponsible, malicious or oppressive use of power; and also to maintain a puni-

tive remedy for the commonplace types of trespass or assault, if accompanied by insult or contumely, which touch the life of ordinary men and women." (A. 124-125).

He further stated, "the Courts will have to keep a tight reign on actions * *" (A. 128). Trial Judges should "not lightly allow a claim to go to a jury." (A. 128).

He further stated, "the present case is also an example, in my opinion, of a claim for exemplary damages that should not be entertained" (A. 129). That here there was some provocation, and on the evidence taken as a whole, "a prima facie case for the serious and exceptional remedy of exemplary damages was not made out" (A. 131). It is manifestly a case where the remedy should not be granted. (A. 131).

Taylor v Beere was a libel action.

These cases obviously are no authority for the granting of exemplary damages under the undisputed facts in our instant case.

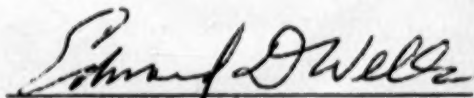
CONCLUSION

This case does not involve any contested issue of federal law. The only reason that it was brought in a federal court was solely on the basis of diversity of citizenship. The matters set forth in Supreme Court Rule 17 which might merit a granting of the writ are not present. Further, the Court of Appeals has committed no error.

Wherefore, respondent respectfully requests this Honorable Court to deny petitioner's petition for writ of certiorari.

Dated:

Jan. 20, 1983



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